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**In The
Supreme Court of the United States**

BAYSHORE FORD TRUCK SALES, INC.,
PEACH STATE FORD TRUCK SALES, INC.,
LJL TRUCK CENTER, INC.,
VALLEY FORD TRUCK SALES, INC.,
AND HEINTZELMAN'S TRUCK CENTER, INC.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1999, Petitioners sued Ford Motor Company in U.S. District Court alleging violations of two federal statutes and making a state-law claim for breach of contract. The sole basis for federal jurisdiction was “federal question,” and the state-law claim was initially retained under supplemental jurisdiction. After the federal claims had been eliminated from the case by amended pleading, and in compliance with this Court’s recent *Rockwell* decision, the trial court dismissed the case for lack of subject-matter jurisdiction. However, the Eleventh Circuit reversed, finding that subject-matter jurisdiction was still present even though there were no longer any federal-question claims pending in the case. Petitioners present the following questions in this Petition:

1. Must a federal court that has original “federal question” jurisdiction and supplemental jurisdiction under 28 U.S.C. §1367 dismiss the entire case when the federal claims are eliminated from the case before trial by amendment of the complaint?

2. Is the discretion afforded a court under 28 U.S.C. §1367(c)(3) only applicable when the plaintiff’s current live pleading contains a viable federal claim cognizable under 28 U.S.C. §1367(a)?

PARTIES TO THE PROCEEDINGS

Bayshore Ford Truck Sales, Inc., Petitioner
Peach State Ford Truck Sales, Inc., Petitioner
LJL Truck Center, Inc., Petitioner
Valley Ford Truck Sales, Inc., Petitioner
Heintzelman's Truck Center, Inc., Petitioner

There are no parent or publicly held companies that own 10% or more of the corporate stock of any of the Petitioners.

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Ford Motor Company, Respondent
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Bayshore Ford Truck Sales, Inc., Heintzelman's Truck Center, Inc., LJI Truck Center, Inc., Peach State Ford Truck Sales, Inc., and Valley Ford Truck Sales, Inc., state that they are privately held corporations. There are no parent corporations or publicly held companies owning 10% or more of any Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully petition this Honorable Court for a writ of certiorari to review and correct the decision of the United States Court of Appeals for the Eleventh Circuit in *Bayshore Ford Truck Sales, Inc.*, 2008 WL 4846324 (11th Cir. 2008) (unreported decision) which reversed the decision of the United States District Court for the Northern District of Georgia dismissing the lawsuit for lack of subject-matter jurisdiction.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Bayshore Ford Truck Sales, Inc. v. Ford Motor Company*, dated November 10, 2008, is unreported but can be found at 2008 WL 4846324 and is set forth in Appendix (App.) 3-6. The unreported order of the Eleventh Circuit denying reconsideration and *en banc* review, dated January 7, 2009, is set forth in App. 31-32. The unreported memorandum opinions of the United States District Court for the Northern District of Georgia dismissing the case for lack of subject-matter jurisdiction and overruling Ford's motion for rehearing, dated January 22, 2008 and April 8, 2008, are set forth in App.

7-9 and App. 10-14, respectively. The Judgment of the Court of Appeals dated November 10, 2008 is set forth in App. 1-2. The proposed Pre-Trial Order in the District Court (excluding voluminous, irrelevant attachments) is set forth in App. 33-57. The Order dated January 19, 2000, N.D. Ga., Civil Action No. 4:99-CV-173-RLV, is set forth in App. 15-30.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on November 10, 2008. A petition for rehearing *en banc* was considered as a petition for reconsideration and overruled by the Eleventh Circuit on January 7, 2009 and judgment was entered on January 10, 2009.¹ Thus, Petitioner had until April 10, 2009 to file this Petition under Supreme Court Rule 13(1).

The Supreme Court has jurisdiction to review the judgment in question on writ of certiorari in accordance with 28 U.S.C. §1254(1).

¹ Under SUPREME COURT RULE 13.3, the Eleventh Circuit treats petitions for rehearing *en banc* as petitions for panel rehearing. LOCAL RULE FOR THE ELEVENTH CIRCUIT 35-5, Form of Petition: "... A petition for rehearing *en banc* will also be treated as a petition for rehearing before the original panel."

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, Article III:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. §1331, Federal question:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1367, Supplemental jurisdiction:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such

original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

- (1) the claim raises a novel or complex issue of State law,
 - (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
 - (3) the district court has dismissed all claims over which it has original jurisdiction,
- or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

STATEMENT OF THE CASE

Introduction

Petitioners are five franchised Ford dealers. In July 1999, they sued Ford Motor Company for damages based on claims that Ford's program of discounting the price of certain trucks to dealers caused Ford to be in violation of the Robinson-Patman Act, 15 U.S.C. §13, the Dealer Day in Court Act, 15 U.S.C. §1221, and the franchise contracts between Ford and its dealers. Jurisdiction was originally founded on "federal questions" pending in the case, and the state-law breach of contract claim was

retained under supplemental jurisdiction, 28 U.S.C. §1367.²

As set forth in the Procedural History section below, the jurisdictional landscape of this case has changed substantially since 1999. According to the precedents of this Court, those changes dictate that the case must be dismissed for lack of subject-matter jurisdiction and the District Court properly did so.

Petitioners raise one constitutional issue and one issue of statutory construction in this petition. First, Petitioners argue that federal courts who have original jurisdiction under §1331 lose Article III subject-matter jurisdiction under the express terms of §1367(a) when there is no longer a federal claim “in the action” due to amendment of plaintiff’s complaint. Second, Petitioners argue that the discretion to *retain* supplemental jurisdiction under §1367(c)(3) only applies when the plaintiff’s current live pleading still contains a federal claim, and not otherwise, in accordance with *Rockwell Int’l Corp. v. U.S.*, 549 U.S. 457 (2007) and other case precedents.

Factual History

Ford Motor Company sells vehicles through a network of independent, franchised dealers. Ford

² All references in this Petition to federal statutory sections are to Chapter 28, United States Code, and all references to “rules” are to the Federal Rules of Civil Procedure, unless otherwise indicated.

does business with these dealers under the terms of written franchise agreements called "Sales and Service Agreements." One relevant provision of the form franchise agreements, ¶10, requires Ford to sell products to dealers only at "published" prices and discounts (i.e., prices and discounts published to dealers in advance of the sales).

Since the early 1980's, Ford Motor Company sold medium-duty and heavy-duty trucks to dealers like Petitioners using a form of unpublished wholesale-price discount known as "Competitive Price Assistance" or "CPA." Dealers were required to use the CPA program when they purchased trucks from Ford because Ford set the initial wholesale prices of its trucks, called "Wholesale Delivered prices" or "WSD prices," at levels that were higher than the retail or "street" prices the dealers could resell the trucks for. This caused a situation where dealers had to get CPA discounts from Ford in order to pursue profitable retail sales.

According to experts in economics, Ford's CPA program allowed Ford to appropriate all or most of the consumer surplus from the dealers' retail sales. Ford did this by requiring the dealer to tell Ford its anticipated "street" price before Ford would tell the dealer the amount of unpublished CPA discount they would be given to the dealer on each sale. Ford would then set the CPA discount amount at a level that allowed the dealer to make a profit of Ford's choosing, usually between \$0 and 2% of the truck's retail price. By use of the CPA program, Ford was able to misappropriate from its U.S. dealers more than \$2 billion of

what would otherwise have been those dealers' profits.

Procedural History

Petitioners filed suit in July 1999 for violation of 15 U.S.C. §13 (the Robinson-Patman Act, or RPA), 15 U.S.C. §1221 et seq. (the Dealer Day in Court Act, or DDCA), and state-law breach of contract. Petitioners moved to have the case certified as a class action on behalf of all dealers in the United States, but the District Court denied the motion.

The DDCA claim was dismissed by the District Court on January 19, 2000. That decision was never appealed. On December 6, 2002, Petitioners were granted unopposed leave to file a Third Amended Complaint in which they dropped the RPA claims, leaving only the state-law breach of contract claims in their live pleading.³

Several years of motion practice in the District Court and appeals in the Eleventh Circuit then took

³ The DDCA claim is still found in the *text* of the Third Amended Complaint, but that inclusion was deemed and agreed to be a scrivener's error by the parties and by the lower court. See App. 7-8 and 11-12.

The lower courts decided the case as if the DDCA claim was not included in the Third Amended Complaint, and that is the procedural law-of-the-case for purposes of this Petition. This means the Third Amended Complaint contained only Petitioners' state-law breach of contract claim.

place concerning the remaining state-law claims. The case was set for trial on at least two occasions, but has never been tried due to the continuing motion practice and appeals that have constituted the majority of the litigation activity in the case since 2002.

In early January 2003, immediately following the filing of the Third Amended Complaint, the District Court asked counsel to prepare letter briefs regarding whether the case should be dismissed since all federal claims had been eliminated and only state-law claims remained in the action. After receiving those letter briefs (in which Petitioners argued for dismissal and in which Ford opposed it), the District Court decided, without comment or opinion, not to dismiss the case at that time.

In March 2003, Ford filed a motion for summary judgment asking the court to dismiss the lone remaining breach of contract claim. The District Court granted Ford's motion for summary judgment and dismissed the case.

As a final judgment, this ruling was appealed by Petitioners in June 2003. In 2004, the Eleventh Circuit reversed the summary judgment and remanded the case to the trial court.⁴

In July 2005, Petitioners filed a motion to dismiss the case based on the argument that the court

⁴ *Bayshore Ford Truck Sales, Inc. v. Ford Motor Company*, 380 F.3d 1331 (11th Cir. 2004).

should allow Petitioners to pursue their claims as members of a class action that had recently been certified in the Ohio Court of Common Pleas which was adjudicating the same state-law breach of contract claims as were pending in the Petitioners' federal case. The District Court denied this Motion on August 3, 2005, again without comment or opinion.⁵

On August 4, 2005, one day after denying Petitioner's motion to dismiss, the District Court entered an order enjoining further prosecution of a class action certified in *Westgate Ford Truck Sales, Inc. v. Ford Motor Company*, case no. 483526, Cuyahoga County (Ohio) Court of Common Pleas (the "Westgate" case). The same breach of contract claims at issue in this action pend now on behalf of all affected Ford dealers – including Petitioners – in the *Westgate* case. The *Westgate* class action is still ongoing and certification of a nation-wide class of dealers has been affirmed all the way to the Ohio Supreme Court.

Petitioners appealed the District Court's entry of the injunction. In December 2006, the Eleventh Circuit vacated the injunction, holding that the

⁵ The parties submitted a joint proposed Pre-Trial Order to the court on July 11, 2005, but probably due to the court's ongoing activity relating to the *Westgate* case, this Pre-Trial Order was never signed by the court. The Pre-Trial Order clearly shows, however, that only the state-law breach of contract claim remained pending for trial; no federal claims are mentioned because all federal claims had been removed by amended pleading. See App. 40-45.

District Court lacked legal authority to enjoin the *Westgate* case and holding that the Petitioners were “now free to [participate as class members in *Westgate*].”⁶

On April 3, 2007, immediately following remand of the case from the Eleventh Circuit, Petitioners filed a renewed motion to dismiss the case arguing that, in the absence of any federal claims in the action, the Petitioners should be allowed to participate *effectively* in the *Westgate* action by being relieved of the burden of also litigating their identical claims in the Georgia federal court, which leave to participate had been affirmatively acknowledged by the Eleventh Circuit. This motion was denied by the District Court on May 7, 2007, again without comment or opinion.

On June 22, 2007, Petitioners filed a second renewed motion to dismiss the case, arguing that Constitutional due process and judicial economy required that they be allowed to adjudicate their claims in the *Westgate* class action instead of in the Georgia federal court. While this second renewed motion to dismiss was pending and before ruling, on October 22, 2007, the District Court issued an order *sua sponte* calling for briefs on the question of whether it still had subject-matter jurisdiction based

⁶ *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1258 (11th Cir. 2006). The Eleventh Circuit did not reach the Due Process argument the dealers made for requiring dismissal. *Id.*

on two recent cases, *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 127 S.Ct. 1397 (2007), and *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007). After the issue was briefed, on January 22, 2008, the District Court dismissed the case for lack of subject-matter jurisdiction.

Ford appealed that ruling to the Eleventh Circuit. The Eleventh Circuit reversed the District Court, finding that the court did not lose subject-matter jurisdiction following the voluntary removal of the federal claims from the case via amended complaint. This ruling seemingly flew in the face of the *Rockwell* and *Pintando* decisions. Petitioners' motion for panel rehearing and rehearing *en banc* was denied without opinion. The Eleventh Circuit then remanded the case to the trial court for further proceedings.

This Petition followed.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals has entered a decision in conflict with another United States Court of Appeals on the same important matter. See Supreme Court Rule 10(a).

The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and it has decided an important federal question in a way that

conflicts with relevant decisions of this Court. See Supreme Court Rule 10(c).

I. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ELEVENTH CIRCUIT'S RULING BECAUSE IT IMPROPERLY HOLDS THAT THE DECISION ON WHETHER TO DISMISS A CASE FOR LACK OF SUBJECT-MATTER JURISDICTION IS NOT DEPENDENT ON THERE BEING FEDERAL CLAIMS IN THE CASE, BUT RATHER IS DEPENDENT ON THE MANNER IN WHICH FORMER FEDERAL CLAIMS WERE DISMISSED.

In *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457 (2007), this Court held that subject-matter jurisdiction generally depends on the original state of things at the time the action is brought, but if and when things change so, too, does the issue of federal jurisdiction:

The state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction. (Citations omitted). **So also will the withdrawal of those allegations, unless they are replaced by others that establish jurisdiction. Thus, when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction.** *Rockwell*, 549 U.S. at 473 (emphasis added).

The *Rockwell* ruling clearly says that if the federal claims are dismissed from a case via amended pleadings, then subject-matter jurisdiction disappears. The Eleventh's Circuit's ruling in this case is directly contrary to the *Rockwell* precedent. See Supreme Court Rule 10(c).

The law in other circuits is consistent with *Rockwell*, holding that once the last federal claim is eliminated from a "federal question" lawsuit by amendment of plaintiff's complaint, the federal courts automatically lose subject-matter jurisdiction and the case must be dismissed. See *Connectu, LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008); *Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995); *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985) (all holding that the court must look only to the amended complaint in order to determine its subject-matter jurisdiction). These cases demonstrate a conflict in the circuits between their holdings and the holding of the Eleventh Circuit in this case. See Supreme Court Rule 10(a).

A different Eleventh Circuit case relied upon by the trial court below, *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007), was likewise totally faithful to the *Rockwell* precedent. In *Pintando*, the plaintiff originally sued for both a federal statutory violation and state-law fraud, giving the court subject-matter jurisdiction under §1331 for the federal claim, and supplemental jurisdiction under §1367(a) for the state-law claims. While the

defendant's summary judgment motion was pending seeking dismissal of both the state and federal claims, Mr. Pintando was allowed to amend his complaint to exclude the federal statutory claim. The District Court retained jurisdiction anyway, and adjudicated the summary judgment motion on the state-law claim on the merits, finding against Pintando.⁷ Mr. Pintando appealed. The Eleventh Circuit began its discussion with the statement: "The question before us is whether the district court continued to possess subject-matter jurisdiction over Pintando's state law claims **after he amended his complaint** to no longer include any federal claim." *Pintando*, 501 F.3d at 1242 (emphasis added). Finding that the amendment deprived the district court of subject-matter jurisdiction in accordance with the Supreme Court's dictates found in *Rockwell*, the Eleventh Circuit vacated the summary judgment and remanded the case to the district court with instructions to dismiss the case without prejudice.

On the issue of "how" the federal claims are removed from the case, the *Pintando* court explained that concept succinctly:

⁷ Interestingly, Mr. Pintando agreed with the District Court in his case that the court retained supplemental jurisdiction even after dismissal of all federal claims. It was only on appeal that he changed his position, which was fine since jurisdiction may be challenged at any time during a case – even after judgment. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

As a general matter, "[a]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary." (Citations omitted). **In this case, once the amended complaint was accepted by the district court, the original complaint was superseded and there was no longer a federal claim on which the district court could exercise supplemental jurisdiction for the remaining state law claims.**

Pintando, 501 F.3d at 1243 (emphasis added).

As far back as *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the Supreme Court held: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." This jurisprudence recognizes and pays due homage to the concept of limited federal jurisdiction, which itself pays due homage to the equally-important concepts of comity, federalism, and states' rights embodied in the Constitution itself.

Cases like *Gibbs*, *Rockwell*, and *Pintando*, have the same common legal theme or basis: once the federal claim in a "federal question" case is withdrawn or eliminated by amendment of the plaintiff's pleadings, the federal court loses subject-matter jurisdiction, and the case must be dismissed because there are no longer any federal claims "in the action"

supporting pendent or supplemental jurisdiction under §1367.

The District Court below properly interpreted these cases and §1367 and dismissed this case for lack of subject-matter jurisdiction. The Eleventh Circuit did *not* properly interpret these cases *or* §1367, and consequently it improperly reversed the decision of the District Court – all while citing no precedent in support of its decision. The decision of the District Court is faithful to the dictates and precedent of *Gibbs* and *Rockwell*, as well as the text of §1367(a), whereas the decision of the Eleventh Circuit in the present case is not. The Court should therefore grant this Petition, vacate the Eleventh Circuit's ruling, and reinstate and affirm the decision of the District Court dismissing the case for lack of federal jurisdiction.

II. CERTIORARI SHOULD BE GRANTED TO INTERPRET 28 U.S.C. §1367(C)(3) AS ONLY APPLYING WHEN THE PLAINTIFF'S CURRENT LIVE PLEADING CONTAINS A FEDERAL CLAIM.

The express terms of §1367(a) require that a federal claim be extant in the action if supplemental jurisdiction is to exist. That is because the statute only affords supplemental jurisdiction if there are "[federal] claims in the action." The statute does not say "claims in *or that ever were in* the action." The statute is decidedly present tense. By its express terms, §1367(a) says that a federal claim must

remain "in the action" if supplemental jurisdiction is to continue to exist. Once the federal claim is gone from the pleadings, so is supplemental jurisdiction.⁸

Section 1367(c)(3) then says that the court has discretion to retain jurisdiction even after "the federal court has dismissed" all the federal claims. At first blush, this seems to suggest a conflict between §1367(a), which requires a federal claim to be "in the action," and §1367(c)(3), which says the court may retain jurisdiction even after those federal claims are "dismissed" from the action. However, upon closer examination, these two provisions can peacefully co-exist if their actual words are honored and correctly construed.

A claim can still be "in the action" after having been dismissed under Rule 12(b)(6) or Rule 56 because the current live pleading of the plaintiff still contains that claim. That is, even though the court has found that the federal claim will not support a judgment, a federal claim dismissed under Rule 12(b)(6) or Rule 56 is still "in the action" for purposes

⁸ Supplemental jurisdiction is, first and foremost, a rule of judicial efficiency. It allows a federal court to adjudicate state-law claims only if and when it is also adjudicating coincident federal-law claims. However, according to *Rockwell* and going all the way back to *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 346 (1988), and even *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), pendent or supplemental jurisdiction loses its claim to "efficiency" – and hence its *raison d'être* – once the federal claims are removed from the action: there is no "two for one" any longer possible.

of §1367(c)(3) because it remains in the live complaint. Following such a dismissal, the court's §1367(c)(3) discretion would apply.

Once the court allows the plaintiff to amend his pleadings to remove the federal claims from the action, however, then those claims are no longer "in the action" to support jurisdiction but rather have been eliminated *as if they never existed in the first place*.

This construction of §1367 honors both the "discretion" afforded under §1367(c)(3) and the mandatory language of §1367(a) which requires that the federal claim be "in the action," consistently with *Rockwell*.

When Petitioners amended their complaint in 2002 and thereby eliminated all federal claims from the action, the court lost subject-matter jurisdiction under *Rockwell* and §1367(a). The fact that the District Court retained the case after that date, and the fact that the Eleventh Circuit entertained two appeals after the federal courts lost subject-matter jurisdiction, does not create or extend jurisdiction that was statutorily absent.

Federal courts are required to re-evaluate their jurisdiction at every new stage of the proceeding. *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 174 (1997) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). When the last federal claim was eliminated via amended complaint in December 2002, the District Court should have re-evaluated its

jurisdiction and dismissed the case under §1367(a) because there was no longer a federal claim “in the action.” Even though it took the court six years to correct its error, the District Court properly dismissed the case under the *Rockwell* precedent in 2007.

If the rule is that a federal court must have a “hook” upon which to hang supplemental jurisdiction (and that is certainly what §1367(a) seems to say), and if that “hook” must be a substantial federal-question claim that is in the live pleadings and, therefore, “in the action,” then when the plaintiff voluntarily removes the “hook” from the case with the court’s permission, the statutory predicate for federal jurisdiction likewise disappears. This is the express holding in *Rockwell*, *Boelens*, *Connectu*, and *Wellness*.

Otherwise, if the rule is that “federal jurisdiction once established is always established,” as the Eleventh Circuit has held, then the holdings in *Rockwell* and the numerous other cases cited above are clearly wrong and those cases should be overruled. It must be one or the other. The holdings in *Rockwell*, *Boelens*, *Connectu*, and *Wellness*, and the holding of the Eleventh Circuit in this case, cannot logically co-exist.

A Consistent Construction of the Entire Statute is Possible. No cases were found expressly addressing what the §1367(a) phrase “in the action” means. But since the plaintiff is the “master of his

claims,”⁹ claims cannot logically be in the action for purposes of federal jurisdiction unless they are placed there by the plaintiff. It thus makes sense to interpret the §1367(a) phrase “in the action” to mean “in the plaintiff’s current complaint.”

Given that definition, the Court can give perfect consistency and equal force to both §1367(a) and §1367(c)(3) if these provisions are construed as follows:

§1367(a) requires a federal claim to be “in the action” in order to supply supplemental jurisdiction. If a substantial federal claim is in the action (i.e., contained in plaintiff’s current complaint), then even if the claim has been dismissed by the court, say, under Rule 12(b)(6) or on summary judgment under Rule 56, that claim is still “in the action” (i.e., still in plaintiff’s live pleading) and may continue to support supplemental jurisdiction under the court’s discretion found in §1367(c)(3). However, if the federal claim is removed from the case via an amendment of the plaintiff’s complaint, then there is no

⁹ *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 12-13 (2003) (holding that a **defendant** may not invoke federal-question jurisdiction by asserting a defense available only under federal law; under the “well-pleaded complaint” rule, the plaintiff is in control of subject-matter jurisdiction and may avoid federal jurisdiction altogether by simply not pleading any federal claims). Under *Rockwell*, the plaintiff may likewise eliminate federal jurisdiction by removing any federal claims from the case via amended pleading.

longer a federal claim "in the action" upon which to base ongoing supplemental jurisdiction under §1367(a), and the discretionary provisions of §1367(c) are likewise not applicable. Rule 12(h)(3) then requires dismissal.

No other construction of these two statutory subsections honors both of them. In the instant case, the Third Amended Complaint contains no federal claims, and when the District Court allowed that unopposed amendment, federal jurisdiction was lost.

As an added benefit, this construction allows §1331 to have a more-certain meaning in situations where pleaded federal claims are "insubstantial" and therefore subject to dismissal under Rule 12(b)(1). In that situation, the insubstantial nature of the federal claim(s) means there is, for jurisdictional purposes, no federal claim "arising under the Constitution, laws, or treaties of the United States" as required by §1331. This jurisprudence is by now axiomatic. See, e.g., *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006) (citing numerous cases; case must be dismissed upon order granting dismissal of federal claims under Rule 12(b)(1)).¹⁰

¹⁰ "With the vast expansion in the case dockets of all federal courts in recent years, the more settled the procedural system by which these cases are to run the judicial gauntlet, the better off will be litigants, lawyers, and judges." *Yazoo County Indus. Devel. Corp. v. Suthoff*, 454 U.S. 1157, 1161 (1982). The need for more clarity in federal procedure has not lessened – and actually may have become greater – in the past 27 years. See, *Nowak v.*

(Continued on following page)

To interpret "in the action" under §1367(a) to require a live complaint containing a substantial federal claim lends consistency and solidifies all prior case law holding that insubstantial federal claims do not support subject-matter jurisdiction under §1331, and hence cannot support supplemental jurisdiction under §1367. See, e.g., *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360 (C.A.D.C. 2007).

The Eleventh Circuit's Treatment of the DDCA Claim is Plain Error. The Eleventh Circuit's ruling, that because the DDCA claim was dismissed under Rule 12(b)(6) the District Court's jurisdiction was thereafter "cemented in place" regardless of what happened in the case thereafter, is wrong for at least two reasons.

First, it is far from clear that the DDCA claim was actually dismissed under Rule 12(b)(6). The dismissal order, App. 15-30, does not expressly say under which rule the claim was dismissed. But looking at the circumstances of that dismissal seems to point toward dismissal under Rule 12(b)(1).

The DDCA claim was dismissed very early in the case, before discovery and before Ford answered or

Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1188-89 (2nd Cir. 1996) (describing the difficulty in deciding whether a case should be dismissed under Rule 12(b)(1) or Rule 12(b)(6) and the jurisdictional consequences of each). The construction of §1367 proposed in this Petition eliminates or greatly reduces the uncertainty such cases have struggled with.

asserted any defenses, based on a finding by the District Court that Petitioners had failed to assert a prima facie element of a DDCA claim: coercive conduct via a wrongful demand. That is, the District Court dismissed the DDCA claim not because Petitioners could not prove any set of *facts* in support of their claim (the customary basis under Rule 12(b)(6)), but because it found the claim itself legally foreclosed by the definition given to the *elements* of a DDCA claim by a prior court:

As such, Ford's demand, explicit or implicit, that the plaintiffs participate in the CPA program or pay inflated published wholesale prices **is not a wrongful demand and does not constitute coercion or bad faith within the meaning of the Dealers' Day in Court Act**. Consequently, the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim is GRANTED.

App. 22-23 (emphasis added). The DDCA claim was thus dismissed for the reason claims are typically dismissed under Rule 12(b)(1): failure to plead the prima facie elements necessary to assert a legally-viable claim.¹¹ Another way to say this is to say the

¹¹ See, e.g., *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1328 (Fed. Cir. 1998), overruled o.g., *Midwest Indust., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999) (describing as "nontrivial" the distinction between a dismissal of a federal claim under Rule 12(b)(1) and Rule 12(b)(6) for purposes of supplemental jurisdiction under §1367, and finding that failure to plead sufficiently to support the
(Continued on following page)

DDCA claim was legally attenuated and insubstantial, or "wanting in substance" as *Gibbs* phrases it. *Gibbs*, 383 U.S. at 722. Such claims do not support federal-question jurisdiction under §1331. See, e.g., *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360 (Fed. Cir. 2007). Here, since the District Court dismissed the DDCA claims immediately by holding that those claims did not allege "a wrongful demand" as required by the DDCA, the District Court found those claims to be attenuated and insubstantial (i.e., lacking substance) even if it did not expressly say so.

Whether a case is dismissed under Rule 12(b)(6) or Rule 12(b)(1) is also not dependent on which rule the District Court cites in its dismissal order (although none was cited here). Often times a dismissal nominally made under Rule 12(b)(6) has been construed instead to be under Rule 12(b)(1), and vice versa, because the circumstances of the dismissal and the nature of the purported federal claim determine which rule properly applies. See, e.g., *Gould Electronics, Inc. v. U.S.*, 220 F.3d 169 (3rd Cir. 2000) (Rule 12(b)(1) dismissal should have been made instead under Rule 12(b)(6)); *Apple v. Glenn*, 183 F.3d 477, 479 (6th Cir. 1999) (Rule 12(b)(6) dismissal should have been made instead under Rule 12(b)(1)).

Here, the District Court may or may not have based its dismissal on Rule 12(b)(6), but given the

prima facie elements of the claim renders the claim "insubstantial" and subject to Rule 12(b)(1) dismissal).

reasoning for its ruling, it seems better to say the DDCA claim was (or should have been) dismissed under Rule 12(b)(1) because the court found the claim legally insubstantial based on controlling precedent.

Contrary to what the Eleventh Circuit held, if only the DDCA and state-law breach of contract claims had been originally brought by Petitioners, the District Court would have been duty-bound to dismiss the case when it dismissed the DDCA claim. This is so because only **viable** federal claims will support supplemental jurisdiction under §1367(a). See *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (federal courts lack §1331 subject-matter jurisdiction over federal claims that are "attenuated and unsubstantial," and hence also lack pendent or supplemental jurisdiction). The DDCA claim therefore could not provide the "hook" necessary to support supplemental jurisdiction, either before or after it was dismissed by the court in 2000.

Second, even if the DDCA claim had been dismissed in 2000 under Rule 12(b)(6), the subsequent, uncontested elimination of **both** the DDCA **and** RPA claims by amendment to Petitioners' complaint in 2002 meant that there were then no longer any federal claims "in the action" pursuant to the subject-matter jurisdiction test set out in the express text of §1367(a) and the *Rockwell* case.

Thus, in this case it is immaterial whether the DDCA claim was originally dismissed under Rule

12(b)(6) or Rule 12(b)(1), because it was later eliminated from the case by amended pleadings in 2002, and this 2002 pleading amendment deprived the court of subject-matter jurisdiction under *Rockwell*.

CONCLUSION

This case addresses one of the most important legal issues in federal jurisprudence: subject-matter jurisdiction. It also addresses a sub-issue never ruled upon by this Court that is causing unnecessary confusion and conflict in the lower courts: the harmonization of §1367(a) with §1367(c)(3). The Court should grant the Petition to clear up this confusion and resolve the conflict in the circuits.

In this case, there is no longer any federal-question jurisdiction because there are no federal claims pending “in the action” under §1367(a). The “hook” upon which supplemental jurisdiction was originally hung has been eliminated via amended pleadings. Therefore, the Constitution, federal statutes, and prior decisions of this Court preclude the federal courts from adjudicating the case. The District Court’s decision to dismiss the case was entirely proper.

The Eleventh Circuit, however, held that because the first federal claim was involuntarily dismissed from the case, this somehow “cemented in place” the court’s supplemental jurisdiction forever, regardless

of what happened later. This conclusion is not consistent with, much less required by, §1367. Indeed, it is expressly contrary to *Rockwell*, *Boelens*, *Connectu*, and *Wellness*. The Third Amended Complaint not only removed the RPA claim but it removed the DDCA claim as well, so regardless of which federal claim served as the “hook” for supplemental jurisdiction *originally*, that hook is now gone due to amended pleading.

There is no case precedent supporting the ruling by the Eleventh Circuit or its hypothetical scenarios, and in fact its ruling is contrary to the concept of limited federal jurisdiction, the express terms of §1367(a), and the recent decisions of this Court and other circuit courts.

Finally, the Eleventh Circuit’s ruling creates a situation where federal jurisdiction is based, not on the claims pending in the action as required by the Constitution and federal statutes, but rather on whether the federal claims are voluntarily or involuntarily dismissed – a wholly-unworkable and unprecedented basis on which to found jurisdiction.

The Petition for Writ of Certiorari should be granted so the decision of the Eleventh Circuit may be vacated and the decision of the District Court affirmed.

Respectfully submitted,

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Attorneys for Petitioners

App. 1

**United States Court of Appeals
For the Eleventh Circuit**

No. 08-12587

District Court Docket No.
99-00173-CV-RLV-4

BAYSHORE FORD TRUCKS SALES, INC.,
HEINTZELMAN'S TRUCK CENTER, INC.,
LJL TRUCK CENTER, INC.,
PEACH STATE FORD TRUCK SALES, INC.,
VALLEY FORD TRUCK SALES, INC.,
Individually and as Representatives for a
Class of Similarly Situated Entities,

Plaintiffs-Appellees,

WESTGATE CLASS,

Intervenor Plaintiff-Appellee,

versus

FORD MOTOR COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

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JUDGMENT

(Filed Nov. 10, 2008)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: November 10, 2008
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12587
Non-Argument Calendar

D. C. Docket No. 99-00173-CV-RLV-4

BAYSHORE FORD TRUCKS SALES, INC.,
HEINTZELMAN'S TRUCK CENTER, INC.,
LJL TRUCK CENTER, INC.,
PEACH STATE FORD TRUCK SALES, INC.,
VALLEY FORD TRUCK SALES, INC.,
Individually and as Representatives for a
Class of Similarly [sic] Situated Entities,

Plaintiff-Appellees,

WESTGATE GLASS,

Intervenor Plaintiff-Appellee,

versus

FORD MOTOR COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

(November 10, 2008)

Before TJOFLAT, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The district court dismissed this case for lack of jurisdiction on the ground that our decision in *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007), mandated the dismissal. Appellant challenges the court's decision, arguing that *Pintando* is inapposite. We agree that it is.

In *Pintando*, the plaintiff invoked the district court's federal question jurisdiction, 28 U.S.C. §§ 1331 and 1343, by seeking relief under Title VII of the Civil Rights Act of 1964, and the court's supplemental jurisdiction, 28 U.S.C. § 1367, by seeking relief for violations of state law. After the defendant moved for summary judgment, the plaintiff moved the court for leave to amend his complaint. The court granted his motion, and he filed an amended complaint which deleted the Title VII claim and reasserted the state law claims. The court granted the defendant summary judgment on the state law claims, and the plaintiff appealed. We held that the amended complaint deprived the district court of supplemental jurisdiction; plaintiff's *voluntary* abandonment of the Title VII claim operated to divest the court of its federal question jurisdiction and with it the court's supplemental jurisdiction to litigate the state law claims.

In the case at hand, and as we observed in *In re Bayshore Ford Truck Sales, Inc.*, “[a]t the time the

law suit was filed, the [district] court had subject matter jurisdiction based on the [plaintiffs'] federal statutory claims." 471 F.3d 1233, 1241 n.16. After the court *involuntarily* dismissed plaintiffs' claims under the Automobile Dealers' Day in Court Act, the fact that plaintiffs, in their amended complaint, *voluntarily* deleted the claims brought under the Robinson-Patman Act, did not preclude the court from continuing to exercise its supplemental jurisdiction over plaintiffs' state law claims. *Id.*

We see no difference in the instant scenario than a scenario in which the plaintiff's complaint contains one federal claim and one state law claim within the court's supplemental jurisdiction, and the court dismisses the federal claim under Fed. R. Civ. P. 12(b)(6), (c), or 56 and then decides, in the exercise of the discretion § 1367 affords it, to litigate the state law claim to judgment. We could not say that the court lost its subject matter jurisdiction once it dismissed the federal claim. Take the scenario one step further and suppose that the court, after announcing that it was retaining jurisdiction, allows the plaintiff to amend its complaint to restate the state law claim. Would this destroy the court's jurisdiction? We think not. That is, in effect, what occurred here – what we observed in *In re Bayshore Ford Truck Sales, Inc.* – plaintiffs amended their complaint, reasserting their state law claims, after the court dismissed involuntarily one of their federal statutory claims. If the district court is correct – that it lost jurisdiction once plaintiffs amended their complaint to restate their

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state law claims – then this court, in *In re Bayshore Ford Truck Sales, Inc.*, surely missed the mark; it should have vacated the district court's order enjoining Westgate Ford Truck Sales, Inc. from prosecuting the Ohio class action, and instructed the district court to dismiss the case for lack of jurisdiction. This court was fully aware of the fact that, at the time the case came before it on appeal, the only claims still pending before the district court were plaintiffs' breach of contract claims; yet, it proceeded to entertain, and adjudicate, the appeal on the merits.

The district court properly exercised its supplemental jurisdiction after involuntarily dismissing plaintiffs' claims under the Automobile Dealers' Day in Court Act. The fact that plaintiffs amended complaint did not contain their Robinson-Patman Act claims did not oust the court of supplemental jurisdiction. The judgment of the district court is vacated and the case is remanded for further proceedings.

VACATED and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK
SALES, INC., et al.,

Plaintiffs,

v.

FORD MOTOR COMPANY,
Defendant.

CIVIL ACTION

NO. 4:99-CV-173-RLV

ORDER

(Filed Apr. 8, 2008)

This matter is before the court upon Ford Motor Company's motion to alter or amend judgment [Doc. No. 357], in which Ford seeks to have this court reconsider its January 23, 2008, order dismissing the action for lack of jurisdiction.

Most of Ford's arguments are simply restatements of arguments previously made and rejected by the court. The court agrees (as noted in its January 23 order that *Pintando v. Miami-Dade Housing Agency* 501 F.3d 1241 (11th Cir. 2007), is not 100% on point. The court will not repeat its analysis here.

Ford takes issue with the court's characterization of the inclusion of the previously dismissed federal Dealer Day in Court in the plaintiffs' Third Amended Complaint as a "scrivener's error." However, the parties stipulated "that Plaintiffs' Dealer Day in

Court Act claims are dismissed and remain dismissed by operation of the Court's January 10, 2000 Order and are not revived and were not intended by any party to be revived by the subsequent filing of the Third Amended Complaint." Regardless of how the inclusion of the Dealer Day in Court claim is characterized, it is clear that such inclusion was erroneous and was of no legal effect whatsoever. The court, like parties, treated the inclusion as if it had never happened.

Ford also argues that in a previous appeal in this case, *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 471 F.3d 1233 (11th Cir. 2006), the Eleventh Circuit recognized that this court had supplemental jurisdiction over the remaining state law claims. This court agrees that, in 2006, the Eleventh circuit assumed that this court could properly exercise supplemental jurisdiction; this court had the same belief, in 2006. However, in 2007, the United States Supreme Court decided *Rockwell International Corp. v. United States*, ___ U.S. ___, 127 S.Ct. 1397 (2007), and later that year, the Eleventh Circuit, relying on *Rockwell International*, decided *Pintando v. Miami-Dade Housing Agency* 501 F.3d 1241 (11th Cir. 2007). Those cases changed the law with respect to a district courts ability to exercise supplemental jurisdiction in certain circumstances.

Again, the court recognizes that the instant case is not totally on point with *Rockwell International* and *Pintando*, but as discussed in the court's January 23 order, the court finds the reasoning in those cases

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to be applicable to the instant case. There are no new arguments in Ford's brief that would warrant this court's reaching a different decision.

For the forgoing reasons, Ford's motion to alter or amend judgment is DENIED.

SO ORDERED, this 8th of April, 2008.

/s/ Robert L. Vining, Jr.

ROBERT L. VINING, JR.
Senior United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK
SALES, INC., et al.,

Plaintiffs,

v.

FORD MOTOR COMPANY,

Defendant.

CIVIL ACTION

NO. 4:99-CV-173-RLV

ORDER

(Filed Jan. 22, 2008)

This action, arising out of various franchise agreements between Ford Motor Company and five Ford medium- and heavy-duty truck dealers, was originally filed on July 1, 1999. The court subsequently noted that the complaint was the kind of "shotgun pleading" that the Eleventh Circuit has repeatedly condemned. By order filed on September 21, 1999, the court directed the plaintiffs to file an amended and recast complaint. That amended and recast complaint was filed on October 21, 1999.

In that amended complaint, the plaintiffs alleged that Ford Motor Company had breached its contracts with the plaintiffs and violated both the Robinson-Patman Act, 15 U.S.C. § 13, and the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221-225. By order docketed on January 19, 2000, the court

dismissed the Automobile Dealers' Day in Court claims but declined to dismiss the Robinson-Patman claims and the state law breach of contract claims.

The plaintiffs sought class certification of their claims, but by order filed on September 5, 2000, this court denied the plaintiffs' motion. The court subsequently denied the plaintiffs' motion for reconsideration. The plaintiffs then sought permission to appeal that order pursuant to Rule 23(f), Federal Rules of Civil Procedure, but the Court of Appeals for the Eleventh Circuit later denied that request.

On November 14, 2002, the plaintiffs filed a motion, seeking leave to amend their complaint. That motion specifically stated, "Plaintiffs' motion to amend the complaint facilitates the ends of justice because it seeks to stream-line, not expand, the litigation by deleting Count Three, Violations of the Robinson-Patman Act, 15 U.S.C. § 13(a), and clarifying that the remaining litigation only contemplates actionable conduct occurring within the period of six (6) years next preceeding the commencement of the instant action."

By order filed on December 6, 2002, the court granted the motion and directed that the Exhibit A attached to the motion to amend would be considered the amended complaint. However, through a scrivener's error, that amended complaint contained an Automobile Dealers' Day in Court claim. The parties acknowledged that the inclusion of that claim was by error and by consent order filed on January 22, 2003,

agreed and stipulated "that Plaintiffs' Dealer Day in Court Act claims are dismissed and remain dismissed by operation of the Court's January 10, 2000 Order and are not revived and were not intended by any party to be revived by the subsequent filing of the Third Amended Complaint."

Considerable activity occurred between the filing of that amended complaint and October 22, 2007, when the court asked the parties to file briefs addressing the question of whether *Pintando v. Miami-Dade Housing Agency* 501 F.3d 1241 (11th Cir. 2007), requires that this action be dismissed for lack of subject matter jurisdiction.

Pintando, relying on *Rockwell International Corp. v. United States*, __ U.S. __, 127 S.Ct. 1397 (2007), held that when a complaint asserting federal question jurisdiction, and which contains both federal and state claims, is amended to delete the federal claim, such amendment destroys jurisdiction and that the complaint had to be dismissed. The court distinguished those cases where the court dismisses the federal claim; in such cases, 28 U.S.C. § 1367(c)(3) allows the court to exercise supplemental jurisdiction. The court emphasized the language of section 1367(c)(3) which allows a federal court to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction."

The Eleventh Circuit specifically held that if the federal claim is dismissed by the plaintiff through the

filing of a subsequent complaint, that subsequent complaint supersedes the original complaint. "In this case, once the amended complaint was accepted by the district court, the original complaint was superseded and there was no longer a federal claim on which the district court could exercise supplemental jurisdiction for the remaining state law claims." *Pintando*, 510 F.3d at 1243.

This court acknowledges that the facts of the instant case are slightly different from those in *Pintando*. Here, there were two federal claims; one was dismissed by the court, and the other was dismissed by the plaintiffs. If the plaintiffs had dismissed their Robinson-Patman claim and the court had subsequently dismissed their Dealers' Day in Court claim, there clearly would be supplemental jurisdiction over the remaining state law claims. In such a situation there would not have been an amended complaint containing just the state law claims and superseding the original complaint.

However, that is not what happened in the instant case. After the court had dismissed the Dealers' Day in Court claim, the plaintiffs then filed an amended complaint, which deleted their Robinson-Patman claim and contained only state law claims.¹

¹ The fact that the amended complaint, through a scrivener's error, restated the Dealers' Day in Court claim is irrelevant. Such inclusion has been acknowledged to be an error, and the defendant does not argue that such erroneous inclusion should cause a different result.

Based upon the clear language in *Pintando*, this court concludes that since the amended complaint contains only state law claims and since the parties are not diverse, the court lacks subject matter jurisdiction.

Because of the extremely large amount of time and money that the parties have expended in this litigation, the court regrets that the action must be terminated with no adjudication on the merits. However, the court has no choice, since the law is clear that a court may not adjudicate a case over which it does not have subject matter jurisdiction.

For the foregoing reasons, this case is dismissed for lack of subject matter jurisdiction.

SO ORDERED, this 23rd day of January, 2008.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

App. 15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Bayshore Ford Truck Sales,
Inc., et al.,

Plaintiffs,

v.

Ford Motor Company,

Defendant.

CIVIL ACTION

NO. 4:99-CV-173-RLV

ORDER

(Filed Jan. 19, 2000)

This action arises out of various franchise agreements between Ford Motor Company and five Ford medium- and heavy-duty truck dealers. The plaintiffs allege that the defendant, Ford Motor Company ("Ford"), breached its contracts with the plaintiffs and violated several federal statutes in administering its pricing programs. Before the court is the defendant's motion to dismiss for failure to state a claim upon which relief could be granted pursuant to Fed. R. Civ. Pro. 12(b)(6) [Doc. No. 16].

I. FACTUAL BACKGROUND¹

Until 1998, each of the five plaintiffs was a Ford heavy- and medium-duty truck dealer that serviced customers throughout the United States.² The plaintiffs, therefore, competed with each other and with dealers of other brands of medium- and heavy-duty trucks on a nationwide basis. Each plaintiff operated under a franchise agreement with Ford, the material terms of which are substantively identical to each other. Under the franchise agreements, the plaintiffs would purchase heavy- and medium-duty trucks and other company products, such as replacement parts, from Ford for resale to the public.³ According to Paragraph 10 of the franchise agreement, Ford was required to publish all prices and discounts to the plaintiffs, as follows:

Sales of COMPANY PRODUCTS by the Company to the Dealer hereunder will be made in accordance with the prices, charges,

¹ The court draws the facts from the plaintiffs' complaint, the allegations of which the court must accept as true for purposes of ruling on Ford's motion to dismiss. *See Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998).

² Ford ceased manufacturing and distributing heavy- and medium-duty trucks in 1998.

³ Ford's medium- and heavy-duty trucks were sold to dealers as bare chassis. The chassis was a component of the complete vehicle, which was usually assembled by the dealer, a special company called a "body company," or by the final, retail customer. The chassis was typically ordered by the dealer for resale to a particular retail customer and was configured to the retail customer's specifications.

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discounts and other terms of sale set forth in price schedules and other notices published by the Company to the Dealer from time to time in accordance with applicable HEAVY TRUCK TERMS OF SALE BULLETIN or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN. Except as otherwise specified in writing by the Company, such prices, charges, discounts and terms of sale shall be those in effect, and delivery to the Dealer shall be deemed to have been made and the order deemed to have been filled on the date of delivery to the carrier or the Dealer, whichever occurs first. The Company has the right at any time and from time to time to change or eliminate prices, charges, discounts, allowances, rebates, refunds or other terms of sale affecting COMPANY PRODUCTS by issuing a new HEAVY DUTY TRUCK or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN, new price schedules or other notices.

Although the plaintiffs admit that Ford published wholesale prices to them, the plaintiffs contend that, in approximately 1980, Ford began intentionally pricing its medium- and heavy-duty trucks at wholesale prices far in excess of the retail prices these trucks could command in the marketplace. At about the same time, Ford also implemented a pricing program called the "Competitive Price Assistance," or "CPA," program whereby the plaintiffs could apply for and receive discounts or concessions off these inflated wholesale prices, reducing the final wholesale price to

a level below the retail price at which the trucks were resold. As a consequence, the plaintiffs were not able to resell Ford medium-and heavy-trucks for a profit without the CPA program.

According to the plaintiffs, the true purpose of the CPA program was to allow Ford to control dealer profits on the sale of medium- and heavy-duty trucks. Ford accomplished this goal by offering two levels of discounts through the CPA program. The first level, called the "Rainbow Schedule" discounts, was published to the plaintiffs and was generally available to all dealers at all times on virtually all sales.⁴ The second level, called the "Appeal-level CPA" discounts, was not published to the plaintiffs or made generally available to all dealers.

The plaintiffs contend that the Appeal-level CPA discounts were given by Ford at its sole discretion based on unpublished criteria.⁵ As a result, the

⁴ This level was later discontinued and replaced with another program called the "Sales Advantage CPA." This program also was published to the plaintiffs and made generally available to all dealers.

⁵ Specifically, when applying for an Appeal-level CPA discount, the dealer was required to identify the retail customer and provide the proposed retail price. Ford then responded in one of three ways: (1) no Appeal-level CPA discount was given; (2) an amount of Appeal-level CPA discount was given, but that amount was insufficient to bring the published wholesale price below the retail price; or (3) just enough Appeal-level CPA discount was given to reduce the published wholesale price to a level that allowed the dealer to realize a profit of between 0%

(Continued on following page)

plaintiffs had no way of knowing whether they were receiving the greatest possible Appeal-level CPA discount. Ford's Appeal-level CPA discounts on comparable trucks could vary among dealers by as much as \$15,000 per truck.

In addition to the Appeal-level CPA discounts, Ford also operated a price program on replacement parts to dealers. Under this program, certain dealers could obtain unpublished discounts off the published wholesale price on certain purchases of replacement parts. These unpublished discounts were not available to the plaintiffs or to all dealers generally. According to the plaintiffs, Ford intentionally withheld information and deceived and misled the plaintiffs about the Appeal-level CPA and replacement parts discounts Ford was offering to some dealers.

The plaintiffs filed this law suit alleging that Ford breached the price publication requirements of the franchise agreements and violated the Dealers' Day in Court Act and the Robinson-Patman Act. Ford filed a pre-answer motion to dismiss all three of the plaintiffs' claims for failure to state claims upon which relief can be granted.

and 4% of the total retail price. If either of the first two responses was given, the dealer typically lost the sale.

II. LEGAL DISCUSSION

A. Legal Standard

When considering a Rule 12(b)(6) motion to dismiss, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiffs. *See Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir.1998). A Rule 12(b)(6) motion to dismiss should be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their allegations which would entitle them to relief. *Id.*

B. Breach of Contract

With regard to their breach of contract claim, the plaintiffs contend that Ford breached its obligation under paragraph 10 of the franchise agreements to publish the prices and discounts for its medium- and heavy-duty trucks and replacement parts and to sell its products at those published prices. According to the plaintiffs, paragraph 10 required Ford to publish the same prices and discounts to each of the plaintiffs and to all other dealers operating under a similar franchise agreement and that the purpose of this provision was to ensure equitable pricing among competing dealers. Specifically, the plaintiffs' second amended complaint alleges the following: (1) the existence of valid contracts between the plaintiffs and the defendant; (2) that the defendant breached these contracts by failing to publish prices, discounts, and other terms of sale to the plaintiffs and by failing to

sell its products in accordance with the published prices, discounts, and other terms of sale; (3) that the plaintiffs were damaged as a result of the alleged breach.

Ford argues that paragraph 10 of the franchise agreements did not require Ford to publish its prices in the manner the plaintiffs maintain, and, therefore, Ford's failure to do so cannot constitute a breach. While Ford's interpretation of the contract ultimately may prove to be correct, the language of the contract is not so clear and unambiguous that the court is prepared to find as a matter of law that the defendant did not breach the agreement. *Meagher v. Wayne State University*, 565 N.W.2d 401, 415 (Mich. Ct. App. 1997) (noting that, under Michigan law, where the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties, making summary disposition inappropriate).⁶ At this juncture, the court cannot say that it is beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief on their breach of contract claim. Contrary to Ford's assertions, the plaintiffs' allegations are sufficient to state a claim for breach of contract. Accordingly, the defendant's motion to dismiss the plaintiffs' breach of contract claim is **DENIED**.

⁶ The court cites Michigan law in this instance because the franchise agreements at issue in this case selected the law of Michigan to govern any contract disputes between the parties.

C. Dealers' Day in Court Act

Ford also moves to dismiss the plaintiffs' Dealers' Day in Court claim for failure to allege a lack of good faith involving coercion, intimidation, or a threat thereof. The Federal Automobile Dealers Franchise Act, commonly referred to as the "Automobile Dealers' Day in Court Act," 15 U.S.C. §§ 1221-1225, gives an automobile dealer a cause of action against an automobile manufacturer for failing to act in good faith in performing or complying with the terms of the franchise agreement between the dealer and the manufacturer. The term "good faith" used in the Dealers' Day in Court Act has a narrow and specialized meaning. An allegation of bad faith in the ordinary sense does not support a Dealers' Day in Court Act claim. Rather, the dealer must allege "coercion, intimidation or threats of coercion or intimidation." 15 U.S.C. § 1221(e); *see also Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985) ("In the absence of coercion, intimidation or threats thereof, there can be no recovery under the Act, even if the manufacturer otherwise acts in "bad faith" as that term is normally used."). Coercive conduct may be shown by "a wrongful demand which will result in sanctions if not complied with." *H.C. Blackwell Co., Inc. v. Kenworth Truck Co.*, 620 F.2d 104, 107 (5th Cir. 1980).

In this instance, the plaintiffs alleged that Ford created the CPA program to circumvent its contractual obligations to publish its prices, discounts, etc., to each of the plaintiffs and to sell its products at

those published prices. The plaintiffs further alleged that Ford "used its size and power to coerce and intimidate" the plaintiffs into using the CPA program to their detriment and described the defendant's treatment of the plaintiffs in pricing medium- and heavy-duty trucks as "discriminatory, coercive and unfair." However, beyond these conclusory allegations of coercion, the plaintiffs do not allege specific conduct on the part of the defendant that was coercive or threatening; nor do the plaintiffs provide an example of a wrongful demand made by the defendant or of sanctions that will result if the demand is not complied with.

In their brief, the plaintiffs argue that, in drawing all inferences in a light most favorable to the plaintiffs, their complaint alleges economic coercion by the defendant. Specifically, the plaintiffs argue that the defendant wrongfully demanded that they participate in the CPA program or be forced to pay wholesale prices so exorbitant that they would be driven out of business and that this was an implicit rather than overt threat. However, as Judge Evans correctly concluded in *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555 (N.D. Ga. 1992), a manufacturer is free to set its wholesale price or its price discounts at whatever level the manufacturer chooses without running afoul of the Dealers' Day in Court Act. *Id.* at 1566-67. As such, Ford's demand, explicit or implicit, that the plaintiffs participate in the CPA program or pay inflated published wholesale prices is not a wrongful demand and does constitute

coercion or bad faith within the meaning of the Dealers' Day in Court Act. Consequently, the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim is **GRANTED**.

D. Robinson-Patman Act

Ford also moves to dismiss the plaintiffs' claim asserting a violation of Section 2(a) of the Robinson-Patman Act. The Robinson-Patman Act prohibits a seller from engaging in unlawful price discrimination among its customers. 15 U.S.C. § 13a. To establish a Robinson-Patman Act claim, the plaintiffs must plead and prove: (1) that the sales at issue were made in interstate commerce, (2) that the goods sold were of like grade and quality, (3) that the defendant discriminated in price between the purchasers of the goods, and (4) that the discrimination had a prohibited effect on competition. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990); see also *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988).

Ford contends that the plaintiffs' complaint is insufficient for several reasons. First, Ford argues that the plaintiffs failed to allege that the trucks at issue were of "like grade and quality" and failed to allege an impact on competition. After a review of the plaintiffs' complaint, the court finds that the plaintiffs have adequately pled the elements of like grade and quality and impact on competition under the

notice pleading requirements of Rule 8, Federal Rules of Civil Procedure.

The purpose of notice pleading is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Quality Foods v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The specificity with which Ford contends the plaintiffs must plead their Robinson-Patman Act claim is not warranted under this liberal pleading standard. Whether the trucks in issue are in fact of like grade and quality or whether the favored and disfavored purchasers were in fact competing on the same functional level in the same geographic markets will require further investigation through discovery and is more properly addressed at summary judgment.

The same is also true with regard to Ford's contention that the plaintiffs failed to allege contemporaneous sales. Ford provides no authority for the proposition that the plaintiffs must affirmatively allege that the sales that form the basis of the claim were contemporaneous in order to comply with Rule 8. It is true that "the sales under comparison must be reasonably contemporaneous" as stated in *Black Gold, Ltd. v. Rockwool Indus.*, 729 F.2d 676, 683 (10th Cir. 1984). However, nothing in *Black Gold* or the other cases cited by Ford requires a plaintiff to affirmatively plead contemporaneousness in the

complaint to avoid dismissal for failure to state a claim.⁷

Ford also contends that the plaintiffs failed to allege that the CPA discounts were not functionally available to them. However, functional availability is not an essential element of the plaintiffs' claim, but a defense available to the defendant to negate the essential element of price discrimination. See *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1516-17 (11th Cir. 1989) (discussing the "the judicially created 'availability defense'"); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326-27 n.17 (5th Cir. 1998) (noting that the functional availability theory is technically not an affirmative defense, but the negation of an element of the plaintiff's case); see generally 3 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 25.7 at 455 & n.79 (1983) (stating that availability may operate as either a rebuttal of the plaintiff's prima facie case or as a

⁷ The procedural posture of each of the three cases cited by Ford makes those cases inapplicable here. All three involved a review of the facts in the record, not a review of the allegations in the complaint.

The court could find only one case involving a defendant's motion to dismiss a Robison-Patman Act claim for failure to affirmatively plead contemporaneous sales. In that case, the district court denied the motion, stating, "The necessary relationship of two sales to bring them within the scope of Section 2(a) is a matter of many facts, and a cause of action should not be dismissed for failure to plead complete details such as specific dates of sales." *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230, 235 (D.N.J. 1956).

defense and noting that "the issue is more likely to be expressly raised by the defendant than by the plaintiff") As such, it is not necessary for the plaintiffs to plead functional availability in their complaint, and a failure to do so will not result in dismissal.

Finally, Ford claims that the plaintiffs' complaint is insufficient because it contains no allegation of two completed sales to different purchasers. According to Ford, the plaintiffs claim rests on a competitive bidding process and that, under *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), this sort of claim is not cognizable under the Robinson-Patman Act.

To state a claim under the Robinson-Patman Act, the plaintiffs must allege at least two sales "at two different prices to two different actual buyers." *M.C. Manufacturing Co.*, 517 F.2d at 1065; *Pierce v. Commercial Warehouse, Div. of Thompson Automotive Warehouse*, 876 F.2d 86, 87 (11th Cir.1989). In a competitive bidding situation, in which only one of the bidders will ultimately secure the sale, the two-purchaser requirement cannot be met. The Robinson-Patman Act requires competitive buyers not competitive bidders. *M.C. Manufacturing Co.*, 517 F.2d at 1066-67.

Ford admits in its brief that the plaintiffs' complaint alleges both completed sales of comparable trucks at higher prices and lost bids. Def.'s Br. At 17. After reviewing the complaint, the court agrees with this assessment. See Pls.' Compl. at ¶¶ 79 & 82.

However, Ford asserts that the plaintiffs "did not actually buy any vehicles from Ford in competition with any other dealer at a higher price as a result of the disputed discounts, because the agreement to purchase the vehicle by the ultimate consumer was entered into before any actual vehicle sales occurred to fulfill the contracts." In support of this contention, Ford cites paragraph 37 of the complaint, which states:

When applying for Appeal-Level CPA, the named Plaintiffs and other dealers were required to tell Ford the identity of the dealer's retail customer and the proposed retail price the dealer anticipated charging for the truck(s). Ford then gave, in its sole discretion, either:

- a. no Appeal-Level CPA;
- b. an insufficient amount of Appeal-level CPA to bring the True Dealer Cost below retail price (effectively precluding the dealer from completing the transaction); or
- c. just enough Appeal-Level CPA to reduce the True Dealer Cost to a level that would allow the dealer to realize a profit of from 0% to 4% of the total retail price.

However, this paragraph of the complaint does not say as much as Ford contends it says. Neither this paragraph nor the other allegations of the complaint

make it clear that all the sales at issue arose in a competitive bidding context.

The court notes that the problem with Ford's argument on this issue may be one of timing.⁸ Whether the plaintiffs' allegations are in fact supported by any evidence or are in fact true are not issues before the court on a motion to dismiss for failure to state a claim. If Ford's contention is true that all of the plaintiffs' transactions arise in a competitive bidding context, these facts will come to light during discovery. At that time, Ford may move for summary judgment on the basis that the plaintiffs have failed to present any evidence of two competing purchasers. See, e.g., *Capital Ford Truck Sales, Inc. v. Ford Motor Company*, 819 F. Supp. 1555, 1574 (N.D. Ga. 1992) (finding that the record established that the two-purchaser requirement was not met, thus entitling the defendant to summary judgment). However, at this stage in the proceedings, the plaintiffs' complaint alleges that they bought trucks of like grade and quality at higher prices than other competing dealers, and, for purposes of this motion to dismiss, the court must accept that allegation as true.

⁸ The same is true of the plaintiffs' argument that they fall within the narrow exception to the two-purchaser requirement established in *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951).

III. CONCLUSION

For the reasons discussed above, the court **GRANTS IN PART** and **DENIES IN PART** the defendant's motion to dismiss. Specifically, the court **GRANTS** the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim, but **DENIES** the defendant's motion to dismiss the plaintiffs' breach of contract and Robinson-Patman Act claims.

SO ORDERED, this 19th day of January, 2000.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 08-12587-JJ

BAYSHORE FORD TRUCKS SALES, INC.,
HEINTZELMAN'S TRUCK CENTER, INC., LJJ
TRUCK CENTER, INC., PEACH STATE FORD
TRUCK SALES, INC., VALLEY FORD TRUCK
SALES, INC., Individually and as Representatives
for a Class of Similarly
Situated Entities,

Plaintiffs-Appellees,

WESTGATE CLASS,

Intervenor Plaintiff-Appellee,

versus

FORD MOTOR COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING
AND PETITION(S) FOR REHEARING EN BANC

(Filed Jan. 7, 2009)

Before: TJOFLAT, BIRCH and DUBINA, Circuit
Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK	*
SALES, INC., HEINTZELMAN'S	*
TRUCK CENTER, INC., L.J.L	*
TRUCK CENTER, INC.,	*
PEACH STATE FORD TRUCK	*
SALES, INC., and VALLEY	*
FORD TRUCK SALES, INC.,	*
individually and as	* CIVIL ACTION NO.
Representatives for a Class of	* 4:99-CV-0173-RLV
Similarly Situated Entities,	*
Plaintiffs,	*
	*
vs.	*
	*
FORD MOTOR COMPANY,	*
	*
Defendant.	*

PRETRIAL ORDER

1.

There are no motions or other matters pending for consideration by the court except as noted:

- Plaintiffs' Motion for Reconsideration of Previously Filed Motion for Partial Summary Judgment and for Declaratory Judgment and Plaintiff's Motion to Strike, in Whole or in Part, the Report of Thomas Saving
- Plaintiffs' Motion to Strike Report of Thomas Saving

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- Plaintiffs' Motion to Dismiss
- Plaintiffs' Motion in Limine (filed contemporaneously with this Pretrial Order)
- Defendant's Motion for Consideration of Previously filed Motion to Strike Plaintiffs' Expert Fred Kinder; Motion for Summary Judgment on Damages and Motion for Partial Summary Judgment – Statute of Limitations
- Defendant's Motion to Strike Plaintiffs' Expert (Docket No. 110).
- Defendant's Motion for Summary Judgment – Damages (Docket No. 113).
- Defendant's Motion in Limine (filed contemporaneously with this Pretrial Order).

2.

All discovery has been completed, unless otherwise noted, and the court will not consider any further motions to compel discovery. (Refer to LR 37.1B). Provided there is no resulting delay in readiness for trial, the parties shall, however, be permitted to take the depositions of any persons for the preservation of evidence and for use at trial.

None.

3.

Unless otherwise noted, the names of the parties as shown in the caption to this Order and the capacity in which they appear are correct and complete, and there is no question by any party as to the misjoinder or non-joinder of any parties.

No question.

4.

Unless otherwise noted, there is no question as to the jurisdiction of the court; jurisdiction is based upon the following code sections. (When there are multiple claims, list each claim and its jurisdictional basis separately.)

None.

5.

The following individually-named attorneys are hereby designated as lead counsel for the parties:

Plaintiff: James A. Piki
Defendant: Billy M. Donley
Other Parties: (specify): none

6.

Normally, the Plaintiff is entitled to open and close arguments to the jury. (Refer to LR 39.3(B)(2)(b)). State below the reasons, if any, why the Plaintiff

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should not be permitted to open arguments to the jury.

None.

7.

The captioned case shall be tried (XX) to a jury or () to the court without a jury, or () the right to trial by jury is disputed.

8.

State whether the parties request that the trial to a jury be bifurcated, i.e., that the same jury consider separately issues such as liability and damages. State briefly the reasons why trial should or should not be bifurcated.

No bifurcation requested.

9.

Attached hereto as Attachment "A" and made a part of this Order by reference are the questions which the parties request that the court propound to the jurors concerning their legal qualifications to serve.

Attached.

10.

Attached hereto as Attachment "B-1" are the general questions which Plaintiffs wish to be propounded to the jurors on voir dire examination.

Attached hereto as Attachment "B-2" are the general questions which Defendant wishes to be propounded to the jurors on voir dire examination.

Attached hereto as Attachment "B-3", "B-4" etc. are the general questions which the remaining parties, if any, wish to be propounded to the jurors on voir dire examination.

The court shall question the prospective jurors as to their address and occupation and as to the occupation of a spouse, if any. Counsel may be permitted to ask follow-up questions on these matters. It shall not, therefore, be necessary for counsel to submit questions regarding these matters. The determination of whether the judge or counsel will propound general voir dire questions is a matter of courtroom policy which shall be established by each judge.

11.

State any objections to Plaintiffs' voir dire questions: *See* attachment B-2.

State any objections to Defendant's voir dire questions: *See* attachement [sic] to B-1.

State any objections to the voir dire questions of the other parties, if any: N/A.

12.

All civil cases to be tried wholly or in part by jury shall be tried before a jury consisting of not less than six (6) members, unless the parties stipulate otherwise. The parties must state in the space provided below the basis for any requests for additional strikes. Unless otherwise directed herein, each side as a group will be allowed the number of peremptory challenges as provided by 28 U.S.C. § 1870. *See* Fed.R.Civ.P. 47(b).

N/A.

13.

State whether there is any pending related litigation. Describe briefly, including style and civil action number.

No. CV 02-0483526; Westgate Ford Truck Sales, Inc. v. Ford Motor Company; In the Court of Common Pleas, Cuyahoga County, Ohio. Putative class action lawsuit involving the alleged breach of paragraph 10 of Ford Sales and Service Agreement. The trial court granted Plaintiff's Motion for Class Certification on June 7, 2005, and certified a nationwide class identical to the one sought and denied in this case. The Plaintiffs in this case are members of the class that was certified in West Gate. Ford appealed the certification order on June 28, 2005.

14.

Attached hereto as Attachment "C" is Plaintiffs' outline of the case which includes a succinct factual summary of Plaintiffs cause of action and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law creating a specific legal duty relied upon by Plaintiff shall be listed under a separate heading. In negligence cases, each and every act of negligence relied upon shall be separately listed. For each item of damage claimed, Plaintiff shall separately provide the following information: (a) a brief description of the item claimed, for example, pain and suffering; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation, or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.

15.

Attached hereto as Attachment "D" is the Defendant's outline of the case which includes a succinct factual summary of all general, special, and affirmative defenses relied upon and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law relied upon as creating a defense shall be listed under a separate heading. For any counterclaim, the Defendant shall separately provide the following information for each item of damage

claimed: (a) a brief description of the item claimed; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation, or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.

16.

Attached hereto as Attachment "E" are the facts stipulated by the parties. No further evidence will be required as to the facts contained in the stipulation and the stipulation may be read into evidence at the beginning of the trial or at such other time as is appropriate in the trial of the case. It is the duty of counsel to cooperate fully with each other to identify all undisputed facts. A refusal to do so may result in the imposition of sanctions upon the non-cooperating counsel.

17.

The legal issues to be tried are as follows: Plaintiffs:

1. Did Ford sell comparable trucks to dealers at unpublished and/or unequal prices, in violation of the Sales and Service Agreements drafted by Ford Motor Company, causing damages to the Plaintiff dealers on those transactions where the Plaintiff dealer paid more for a truck than did a fellow Ford dealer?

2. Did Ford award greater discounts to some dealers than to the Plaintiff dealers, in violation of the Sales and Service Agreements drafted by Ford Motor Company, causing damages to the Plaintiff dealers on those transactions where the Plaintiff dealer was awarded a lesser discount than was a fellow Ford dealer?
3. Are overcharges (i.e., the differences in prices paid and/or discounts received by the Plaintiff dealers and other Ford dealers who paid less or who received greater discounts) the proper measure of damages in this case?
4. Does 49 CFR Part 565.3 provide the proper, legal definition of "comparable trucks" for purposes of this case?
5. Did Ford engage in conduct sufficient to invoke the doctrine of equitable tolling of the statute of limitations when it intentionally concealed from Plaintiffs the facts necessary to inform Plaintiffs that they had a cause of action for breach of contract, and repeatedly told Plaintiffs that the operation of the CPA program was legal and legitimate when in fact that program was illegal and illegitimate?

Plaintiffs do not agree with or acquiesce to Defendant's statement of the legal issues and believe they are not an appropriate compilation of the legal issues for trial.

Defendants:

1. Whether Plaintiffs' interpretation of the Ford Heavy-Duty Truck Sales and Service Agreements and Ford Truck Sales and Service Agreements at issue is reasonable?
2. Whether Ford's interpretation of the Ford Heavy-Duty Truck Sales and Service Agreements and Ford Truck Sales and Service Agreements at issue is reasonable?
3. Whether Plaintiffs' interpretation of paragraph 10 of Ford Heavy-Duty Truck Sales and Service Agreements and Ford Truck Sales and Service Agreements at issue is borne out by the course of dealing established between the parties for 14 years (for LJL) to 19 years (for Valley, Heintzelman, Peach State, and Bayshore)?
4. Whether Ford's interpretation of paragraph 10 of the Ford Heavy-Duty Truck Sales and Service Agreements and Ford Truck Sales and Service Agreements at issue is borne out by the course of dealing established between the parties for 14 years (for LJL) to 19 years (for Valley, Heintzelman, Peach State, and Bayshore)?
5. Whether, if Ford's interpretation of paragraph 10 is reasonable, the Ford Heavy-Duty Truck Sales and Service Agreements or Ford Truck Sales and Service Agreement at issue were modified by the mutual and consensual conduct of the parties to allow CPA to be given by Ford in its sole

discretion on a deal by deal basis in response to competition in specific transactions and in which the amount of the allowance given varied was not to be published or required to be published to any other dealer?

6. Whether Plaintiffs waived their breach of contract claim?
7. Whether Plaintiffs' breach of contract claim is barred by application of the doctrine of laches?
8. Whether Plaintiffs' breach of contract claim is barred by application of the doctrine of estoppel?
9. Whether Plaintiffs' claims for relief are barred, in whole or in part, by their failure to make timely application for any deposit, refund, allowance, or other payment or credit within twelve (12) months from the time each Plaintiff first became aware of their alleged eligibility as provided for in the applicable Terms of Sale Bulletins?
10. Whether the Plaintiffs' actions in their operation of the Appeal-Level CPA program constitute fraud or misrepresentation and, if so, whether such fraud or misrepresentation precludes Plaintiffs from recovering against Ford?
11. Whether Plaintiffs claims are barred, in whole or in part, because Plaintiffs failed to mitigate their damages?

12. Whether Mr. Fred Kinder is qualified to testify as an expert regarding Plaintiffs' alleged damages?
13. Whether Plaintiffs have laid a foundation for Mr. Kinder's report or purported Rule 1006 summary?
14. Whether Mr. Kinder's proffered testimony and purported Rule 1006 summary are admissible?
15. Whether Mr. Kinder's proffered testimony and purported Rule 1006 summary satisfy Fed. R. Evid. 402 and 403?
16. Whether, if Plaintiffs' interpretation of paragraph 10 is reasonable and if no defense Ford asserts is applicable, Defendant breached paragraph 10 of the Ford Heavy-Duty Truck Sales and Service Agreements or the Ford Truck Sales and Service Agreements at issue; and, if so, whether Plaintiffs were harmed by such breach, and, if so, in what amount?
17. Whether Plaintiffs' purported damage model is valid and based on a reasonable and reliable method for calculating damages under Plaintiffs' theory of the case?
18. Did Ford intentionally conceal from plaintiffs the nature, rules or procedures of the Appeal CPA program?

Defendants do not agree with or acquiesce to Plaintiffs' statement of the legal issues and believe

they are not an appropriate compilation of the legal issues for trial.

18.

Attached hereto as Attachment "F-1" for the Plaintiffs, Attachment "F-2" for the Defendant, and Attachment "F-3", etc. for all other parties is a list of all the witnesses and their addresses for each party. The list must designate the witnesses whom the party will have present at trial and those witnesses whom the party may have present at trial. Expert (any witness who might express an opinion under Rule 702), impeachment and rebuttal witnesses whose use as a witness can be reasonably anticipated must be included. Each party shall also attach to the list a reasonable specific summary of the expected testimony of each expert witness.

All of the other parties may rely upon a representation by a designated party that a witness will be present unless notice to the contrary is given ten (10) days prior to trial to allow the other party(s) to subpoena the witness or to obtain the witness' testimony by other means. Witnesses who are not included on the witness list (including expert, impeachment and rebuttal witnesses whose use should have been reasonably anticipated) will not be permitted to testify, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

Counsel for Plaintiffs and Defendant have discussed witnesses and have agreed to the following:

Plaintiffs have represented that the dealership principals and additional dealership witnesses, which would include Gerald Turnauer, Tom Reynolds, Tim Leskosky, John Drakesmith, Brian O'Donnell, Mike Owens, Ernie Bentley & Jim Kyle, will be called at trial. Plaintiffs have represented to counsel for Ford that if for any reason any of these witnesses are not called during Plaintiffs' case in chief, and Defendant Ford requests that they be available live in Ford's case in chief, Plaintiffs will make them available, upon reasonable notice.

Plaintiffs further indicated that expert witness Fred Kinder will be called, and again, if for some reason he is not called, Mr. Kinder will be made available live for Ford in Ford's case in chief, upon reasonable notice.

Plaintiffs have requested that Ford make available to Plaintiffs during Plaintiffs' case in chief the following Ford witnesses: Bill Royle, Charles O'Donnell, Jeanette Agnew and Ken Smith.

Ford's counsel has represented that Mr. Bill Royle will be made available live for Plaintiffs' case in chief, upon reasonable notice as to the date of appearance.

The parties have agreed that neither Ms. Jeanette Agnew nor Mr. Charles O'Donnell will appear live at trial. Therefore, the parties have agreed that any

deposition designations of their testimony must be provided to opposing counsel on or before Monday July 18, 2005, and that any counter designations must be provided on or before Monday, July 25, 2005. Ford's counsel has not determined at this point if Mr. Ken Smith will be brought to trial. As a result of that representation, Ford has agreed to notify Plaintiffs' counsel on or before July 25, 2005 in writing, whether Ford will bring Mr. Smith live to trial. If Ford determines that Mr. Smith will not testify live, then Plaintiffs shall have four (4) business days from the date of written notification to provide deposition designations with regard to Mr. Smith. Thereafter, Ford shall have a reasonable time to provide counter designations and/or objections.

As to Ford's witness Mr. John Fink, the parties agree that he will testify on August 15, 2005.

See Attachment "F-1" for Plaintiffs.

See Attachment "F-2" for Defendant.

19.

Attached hereto as Attachment "G-1" for the Plaintiffs; "G-2" for the Defendant., and "G-3", etc. for all other parties are the typed lists of all documentary and physical evidence that will be tendered at trial. Learned treatises which are expected to be used at trial shall not be admitted as exhibits. Counsel are required, however, to identify all such treatises under a separate heading on the party's exhibit list.

Each party's exhibits shall be numbered serially, beginning with 1, and without the inclusion of any alphabetical or numerical subparts. Adequate space must be left on the left margin of each party's exhibit list for court stamping purposes. A courtesy copy of each party's list must be submitted for use by the judge.

Prior to trial, counsel shall mark the exhibits as numbered on the attached lists by affixing numbered yellow stickers to Plaintiffs exhibits, numbered blue stickers to Defendant's exhibits, and numbered white stickers to joint exhibits. When there are multiple Plaintiffs or Defendants, the surname of the particular Plaintiff or Defendant shall be shown above the number on the stickers for that party's exhibits.

Specific objections to another party's exhibits must be typed on a separate page and must be attached to the exhibit list of the party against whom the objections are raised. Objections as to authenticity, privilege, competency, and, to the extent possible, relevancy of the exhibits shall be included. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity by the parties and shall be admitted at trial without further proof of authenticity.

Unless otherwise noted, copies rather than originals of documentary evidence may be used at trial. Documentary or physical exhibits may not be submitted by counsel after filing of the pretrial order, except upon consent of all the parties or permission of

the court. Exhibits so admitted must be numbered, inspected by counsel, and marked with stickers prior to trial.

Counsel shall familiarize themselves with all exhibits (and the numbering thereof) prior to trial. Counsel will not be afforded time during trial to examine exhibits that are or should have been listed.

20.

The following designated portions of the testimony of the persons listed below may be introduced by deposition:

Attached hereto as H-1/H-2.

Any objection to the depositions of the foregoing persons or to any questions or answers in the depositions shall be filed in writing no later than the day the case is first scheduled for trial. Objections not perfected in this manner will be deemed waived or abandoned. All depositions shall be reviewed by counsel and all extraneous and unnecessary matter, including non-essential colloquy of counsel, shall be deleted. Depositions, whether preserved by stenographic means or videotape, shall not go out with the jury.

As per paragraph 18 above, the parties are working through the availability of certain Ford witnesses for live testimony during Plaintiffs' case. Pursuant to those agreements, counsel for Ford has agreed to extend the time for Plaintiffs to designate

deposition testimony with regard to Ms. Jeanette Agnew, Mr. Charles O'Donnell and Mr. Ken Smith until Friday, July 15, 2005. Thereafter, Ford shall have a reasonable opportunity to provide counter designations and/or objections.

21.

Attached hereto as Attachments "I-1" for the Plaintiffs, "I-2" for the Defendant, and "I-3", etc. for other parties, are any trial briefs which counsel may wish to file containing citations to legal authority concerning evidentiary questions and any other legal issues which counsel anticipate will arise during the trial of the case. Limitations, if any, regarding the format and length of trial briefs is a matter of individual practice which shall be established by each judge.

Plaintiffs: Plaintiffs reserve the right to file trial briefs once the Court has made its rulings on the pending motions for partial summary judgment, motion to strike expert witnesses and other issues relative to the evidence to be presented in this case.

Defendants: See I-2.

22.

In the event this is a case designated for trial to the court with a jury, requests for charge must be submitted no later than 9:30 a.m. on the date on which the case is calendared (or specially set) for

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trial. Requests which are not timely filed and which are not otherwise in compliance with LR 51.1, will not be considered. In addition, each party should attach to the requests to charge a short (not more than one (1) page) statement of that party's contentions, covering both claims and defenses, which the court may use in its charge to the jury.

Counsel are directed to refer to the latest edition of the Eleventh Circuit District Judges Association's Pattern Jury Instructions and Devitt and Blackmar's Federal Jury Practice and Instructions in preparing the requests to charge. For those issues not covered by the Pattern Instructions or Devitt and Blackmar, counsel are directed to extract the applicable legal principle (with minimum verbiage) from each cited authority.

23.

If counsel desire for the case to be submitted to the jury in a manner other than upon a general verdict, the form of submission agreed to by all counsel shall be shown in Attachment "K" to this Pretrial Order. If counsel cannot agree on a special form of submission, parties will propose their separate forms for the consideration of the court.

Plaintiffs: Plaintiffs desire for the case to be submitted to the jury upon a general verdict. Plaintiffs do not agree with the form of submission made by Ford. attached hereto as Attachment K-2. Plaintiffs object to K-2 as being improper, for many reasons,

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among other things, that the verdict form is confusing, unwieldy, prejudicial, does not conform to the issues or evidence in the case and seeks to shift the burden of proof and persuasion solely on Plaintiffs, contrary to both the facts and legal issues of the case.

Defendants: See K-2 attached.

24.

Unless otherwise authorized by the court, arguments in all jury cases shall be limited to one-half hour for each side. Should any party desire any additional time for argument, the request should be noted (and explained) herein.

The parties request one-half (1/2) hour for the Plaintiffs and Defendant for opening argument and one-half (1/2) hour for the Plaintiffs and Defendant for closing arguments.

25.

If the case is designated for trial to the court without a jury, counsel are directed to submit proposed finding of fact and conclusions of law not later than the opening of trial.

N/A.

Plaintiffs:

- During the course of this litigation, Plaintiffs' counsel, on behalf of Plaintiffs, have communicated in writing with Ford three separate offers of settlement. Ford, as of the date of the filing of this Pretrial Order, has not responded in writing to any of those offers. Furthermore, this Court suggested mediation between the parties and Ford refused to mediate.
- In addition, when this case was on appeal to the 11th Circuit, the 11th Circuit required Court mandated mediation. However, despite conversations between the mediator, counsel for Ford and counsel for Plaintiffs, counsel for Ford represented to the mediator that they had not even spoken with their client and had no authority for settlement.
- In the past month, Plaintiffs counsel have communicated a desire to mediate this case and again Ford has refused to mediate. Plaintiffs made an offer of settlement on June 27, 2005. However, on June 28, 2005, counsel for Plaintiffs and counsel for Ford met in person and discussed settlement and Ford made no offers of settlement at that time and there is no likelihood of settlement of the case at this time.

Defendant:

- The court communicated with counsel regarding settlement in a letter prior to granting Ford's motion for summary judgment on liability in May 2003.
- The parties mediated this case while on appeal from the district court's order granting Ford's Motion for Summary – Liability on February 2, 2004, but no settlement was reached.
- Plaintiffs' counsel submitted to defendant's counsel a settlement demand on or about June 27, 2005.
- Counsel met in person and discussed settlement on June 28, 2005.
- Plaintiffs' counsel submitted to Defendant's counsel a purported offer of judgment on or about June 29, 2005.
- There is no likelihood of settlement of the case at this time.

27.

Unless otherwise noted, the court will not consider this case for a special setting, and it will be scheduled by the clerk in accordance with the normal practice of the court.

The case is set for trial on August 8, 2005.

28.

The Plaintiffs estimate that it will require five (5) days to present their evidence. The Defendant estimates that it will require five (5) days to present its evidence. It is estimated that the total trial time is ten (10) days.

29.

IT IS HEREBY ORDERED that the above constitutes the pretrial order for the above captioned case (____) submitted by stipulation of the parties or (____) approved by the court after conference with the parties.

IT IS FURTHER ORDERED that the foregoing; including the attachments thereto, constitutes the pretrial order in the above case and that it supersedes the pleadings which are hereby amended to conform hereto and that this Pretrial Order shall not be amended except by Order of the court to prevent manifest injustice. Any attempt to reserve a right to amend or add to any part of the pretrial order after the pretrial order has been filed shall be invalid and of no effect and shall not be binding upon any party or the court, unless specifically authorized in writing by the court.

IT IS SO ORDERED this _____ day of _____,
20__.

UNITED STATES DISTRICT JUDGE

Each of the undersigned counsel for the parties hereby consents to entry of the foregoing pretrial order, which has been prepared in accordance with the form pretrial order adopted by this court.

/s/ James A. Pikel
Counsel for Plaintiff

/s/ Billy M. Donley
Counsel for Defendant

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(2)

No. 08-1186

Supreme Court, U.S.
FILED

APR 17 2009

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

—◆—
BAYSHORE FORD TRUCK SALES, INC.,
PEACH STATE FORD TRUCK SALES, INC.,
LJL TRUCK CENTER, INC.,
VALLEY FORD TRUCK SALES, INC.,
AND HEINTZELMAN'S TRUCK CENTER, INC.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

—◆—
**OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

—◆—
JAMES C. WINTON
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Attorneys for Respondent

QUESTIONS PRESENTED

The Writ Petition presents the following issues:

1. Should the Court grant a writ of certiorari to review the decision of the Eleventh Circuit that correctly applies 28 U.S.C. § 1367(c)(3) in accordance with the precedence of this Court and the other Circuit Courts?

2. Should this Court grant a writ of certiorari to review settled case law interpreting 28 U.S.C. § 1367(c)(3)?

**PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE
STATEMENT PURSUANT TO RULE 29.6**

PETITIONERS

Bayshore Ford Truck Sales, Inc.
Peach State Ford Truck Sales, Inc.
LJL Truck Center, Inc.
Valley Ford Truck Sales, Inc.
Heintzelman's Truck Center, Inc.

All Petitioners are represented by:

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Telephone: (706) 324-0050

**PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE
STATEMENT PURSUANT
TO RULE 29.6 – Continued**

RESPONDENT

Ford Motor Company

Pursuant to SEC filings, Ford has been notified that as of December 31, 2008, the following entities had a 5% or greater ownership interest of Ford common stock, or owned securities convertible into more than 5% ownership of Ford common stock, or owned a combination of Ford common stock and securities convertible into Ford common stock that could result in more than 5% ownership of Ford common stock: Bank of America Corporation, 100 North Tryon Street, Floor 25, Bank of America Corporate Center, Charlotte, North Carolina 28255, and certain affiliates, owned 332,320,307 shares of common stock (15.91%), including 315,505,881 shares deemed owned by Bank of America, N.A., by virtue of one of its affiliate's status as investment manager under Ford's 401(k) plans.

Respondent is represented by:
James C. Winton (Counsel of Record)
Billy M. Donley
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1000 Louisiana, Suite 2000
Houston, Texas 77002-5009
(713) 646-1304

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I. COUNTERSTATEMENT OF THE CASE

The Petition arises from a case that has been pending in the Northern District of Georgia for over ten years. This case that has now been to the Eleventh Circuit Court of Appeals three times since the District Court dismissed Petitioners' federal Automobile Dealers' Day in Court Act claim which is the fulcrum of the court's jurisdiction. Here, Petitioners invite this Court to embark on a journey based on a completely distorted statement of the case which culminates in a suggestion that the Court rewrite the jurisprudence of supplemental jurisdiction.

While Petitioners at one point acknowledge that one of their federal claims was "dismissed by the District Court", that *sotto voce* admission is virtually drowned out by the repeated spin they otherwise put on the dismissal, incorrectly stating that "all federal claims were eliminated from the case by amended pleading."¹ As observed by the Eleventh Circuit below:

After the [district] court *involuntarily* dismissed plaintiffs' claims under the Automobile Dealer Day in Court Act, the fact that plaintiffs, in their amended complaint, *voluntarily* deleted the claims brought under the Robinson-Patman Act, did not preclude the court from continuing to exercise its

¹ See Petition at i (twice); 6; 10 at footnote 5; 12; 14; and 16. While Petitioners use varying formats of that statement, it is a theme repeated throughout the petition.

supplemental jurisdiction over plaintiffs' state law claims. . . . (Emphasis in original) (App. 5)

That decision of the Circuit Court was fully in accord with § 1367(c)(3) as recognized by this Court's decisions in *Osborn v. Haley*, 549 U.S. 225, 245 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-51 (1988); and *Rosada v. Wyman*, 397 U.S. 397, 403-05 (1970).

This case is not controlled by either *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) or *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007) as argued by Petitioners.

The petition should be denied.

II. COUNTERSTATEMENT OF FACTS

A. Jurisdictional Facts

Petitioners repeatedly state that all federal claims were "eliminated from the case by amended pleading", or words to that effect. That characterization of the dismissal of the key jurisdictional claim is simply false. The facts as related to this petition are as follows:

Petitioners filed suit in July 1999, invoking the District Court's original jurisdiction under 28 U.S.C. § 1331, asserting claims under the Automobile

Dealers' Day in Court Act, 15 U.S.C. § 1221, *et seq.* ("ADDCA")², and the Robinson-Patman Act, 15 U.S.C. § 15, *et seq.* ("RPA"). They also invoked the District Court's supplemental jurisdiction under 28 U.S.C. § 1367(a) over state breach of contract claims. (*See* Complaint and Petition for Class Action, Resp. App. 1-8)³

In January 2000, the District Court granted Ford Motor Company's ("Ford") motion to dismiss the ADDCA claim contained in the Second Amended Complaint and Petition for Class Action (Resp. App. 74-90) for failure to state a claim based on its conclusion that as a matter of law, the facts that Petitioners had alleged as "coercion", did not constitute such under the Act.

In December 2002, Petitioners were granted leave without opposition to file a Third Amended Complaint and Petition for Class Action ("Third Amended Complaint"). There they voluntarily deleted

² While the title of the Act refers to "Automobiles", the term is broadly defined to include trucks. 15 U.S.C. § 1221(a). *See, e.g., River Oaks Motor Homes, Inc. v. Winnebago Indus., Inc.*, 371 F.Supp. 137 (S.D. Tex. 1974) (defining "truck" as a "self-propelled motor vehicle designed primarily to haul freight or cargo" as covered under the Act).

³ Respondent cites to the appendix attached to Petitioners' brief as "(App. ____)". Citations to supplemental appendix materials attached hereto by Respondent are cited as "(Resp. App. ____)". Those materials for the most part contain only relevant pages in order to reduce the bulk of the appendix.

the RPA claim but realleged the ADDCA claim. (Resp. App. 18-26)⁴

Shortly after Petitioners filed their Third Amended Complaint, the District Court contacted the parties to inquire whether the ADDCA claim had been left in the complaint in an attempt to revive it.⁵ In January 2003, the District Court entered an agreed order which stated that: "Plaintiffs' Dealer Day in Court Act claims are dismissed and *remain dismissed by operation of the Court's January 10, 2000 Order* and are not revived and were not intended by any party to be revived by the subsequent filing of the Third Amended Complaint". (Emphasis added) (Resp. App. 91-94)

Petitioners state that it was "agreed" that the ADDCA claim was left in the Third Amended Complaint as a result of a "scrivener's error". (Petition at 8, n. 3) Although the District Court made such an observation in its January 22, 2008, dismissal order, nowhere in the agreed order does it state that Ford "agreed" that the ADDCA claim had been left in the

⁴ Petitioners attached a version of the Court's order that contains a critical typographical error, later corrected by the District Court. Respondent has attached the corrected version of the order. (Resp. App. 74-90)

⁵ The inquiry by the District Court came in a telephone call to counsel during a deposition. Thus, there is no document of record regarding the "inquiry", other than the resultant stipulation.

complaint as a result of a "scrivener's error".⁶ In fact, in their Third Amended Responses to Mandatory Disclosures, filed May 12, 2003, *after they submitted the agreed order*, Petitioners made it clear that the ADDCA claim had been left in the Third Amended Complaint intentionally in order to preserve the issue for appeal. (Resp. App. 27-34) There they stated: "Given that the Dealer Day in Court Act claims have been dismissed from the case *at present*, they will only be adjudicated following appeal and remand of the claims by the appellate court, where necessary." (Emphasis added) (Resp. App. 30) Following the voluntary dismissal of the RPA claim, the District Court asked for briefing by the parties regarding the court's continuing exercise of jurisdiction over the remaining state breach of contract claim. The District Court determined to retain jurisdiction. (Resp. App. 74-90)

In May 2003, the District Court granted Ford's motion for summary judgment on the remaining breach of contract claim. Plaintiffs appealed that summary judgment but did not appeal the dismissal

⁶ Petition at 8, n. 3. The "scrivener's error" comment came from the District Court in its order dismissing the case under *Rockwell* and *Pintando*. (App. 11-14 and App. 13 n. 1) Petitioners' assertion at footnote 3 of the Petition that such characterization by the District Court is the "procedural law of the case" for purposes of this petition, is nonsense. As quoted above, the Eleventh Circuit, in reversing the dismissal, found that "the [district] court *involuntarily* dismissed plaintiffs' claims under the Automobile Dealer Day In Court Act. . . ." (App. 5)

of the ADDCA claim. The Eleventh Circuit affirmed the summary judgment in part and reversed in part, remanding the case to the District Court for further proceedings. *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 380 F.3d 1340 (11th Cir. 2004) (*Bayshore I*).

In 2005, the case was back before the Eleventh Circuit on a petition for writ of mandamus by the Dealers challenging the injunction issued by the District Court to enforce its denial of class certification and seeking review of the denial of their Rule 41(a)(2) motion to dismiss. The Eleventh Circuit reversed the injunction but denied the writ petition as to the Rule 41(a)(2) dismissal. *In re Ford Motor Co.*, 471 F.3d 1233 (11th Cir. 2006).

Following the second remand, in 2007 the District Court called for briefs on the question of whether it was compelled to dismiss the case based on the Eleventh Circuit's decision in *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007). (Resp. App. 35) The parties briefed the issue and the District Court issued an order stating that: "*Pintando*, relying on *Rockwell* [citation omitted] held that when a complaint asserting federal question jurisdiction, and which contains both federal and state claims, is amended to delete the federal claim, such amendment destroys jurisdiction and [] the complaint had to be dismissed." The District Court went on to state that "The Eleventh Circuit specifically held that if the federal claim is dismissed by the plaintiff through the filing of a subsequent complaint,

that subsequent complaint supersedes the original complaint." (App. 12-13) Because the District Court found that the ADDCA claim had been left in the Third Amended Complaint as the result of a "scrivener's error", it found that the ADDCA claim had been deleted from the complaint and that it was bound by *Rockwell* and *Pintando* to dismiss for lack of subject matter jurisdiction. (App. 10-14) That is, the District Court found that because Petitioners amended to delete the already dismissed ADDCA claim, along with the RPA claim, that amendment divested the District Court of any discretion to exercise supplemental jurisdiction over the remaining state law claim. "[S]ince the amended complaint contains only state law claims and since the parties are not diverse, the court lacks subject matter jurisdiction." (App. 14) The District Court did not do so as an exercise of its § 1367(c) discretion but because, as it read *Rockwell* and *Pintando*, it had no other choice:

Because of the extremely large amount of time and money that the parties have expended in this litigation, the court regrets that the action ***must be terminated*** with no adjudication on the merits. However, the court has no choice, since the law is clear that a court may not adjudicate a case over which it does not have subject matter jurisdiction.

(Emphasis added) (App. 14)

Ford moved to alter or amend the judgment, noting among other things that there had been no

"scrivener's error" and that the involuntary dismissal controlled. The District Court responded to this motion with an order stating that: "Regardless of how the inclusion of the Dealer Day in Court claim is characterized, it is clear that such inclusion was erroneous and was of no legal effect whatsoever. . . . The Court finds the reasoning of [*Rockwell* and *Pintando*] to be applicable to the instant case." (App. 8-9) The District Court concluded that *Rockwell* and *Pintando* represented a change in the law of supplemental jurisdiction and thus the prior jurisprudence was no longer binding: "Those cases change the law with respect to a district courts [sic] ability to exercise supplemental jurisdiction in certain circumstances." (App. 8)

On Ford's appeal of the dismissal, the Eleventh Circuit found that the dismissal of the ADDCA claim was in fact *involuntary* and that the District Court retained discretion to exercise supplemental jurisdiction thereafter:

After the [district] court *involuntarily* dismissed plaintiffs' claims under the Automobile Dealer Day in Court Act, the fact that plaintiffs, in their amended complaint, *voluntarily* deleted the claims brought under the Robinson-Patman Act, did not preclude the court from continuing to exercise its supplemental jurisdiction over plaintiffs' state law claims. . . . (Emphasis in original) (App. 5)

The district court properly exercised its supplemental jurisdiction after involuntarily dismissing plaintiffs' claims under the Automobile Dealers' Day in Court Act. The fact that the plaintiffs' amended complaint did not contain their Robinson-Patman Act claims did not oust the court of supplemental jurisdiction. . . .

(App. 6)

Moreover, with regard to the question of a "scrivener's error", the Circuit Court treated that issue as of no significance, observing:

We could not say that the court lost its subject matter jurisdiction once it dismissed the federal claim. Take the scenario one step further and suppose that the court, after announcing that it was retaining jurisdiction, allows the plaintiff to amend its complaint to restate the state law claim. Would this destroy the court's jurisdiction? We think not. That is in effect what occurred here. . . .

(App. 5)

Petitioners have sought a writ of certiorari to review the holding of the Eleventh Circuit and to adopt a novel interpretation of § 1367(c) supplemental jurisdiction.

B. Counterstatement of Background Facts

While for the most part, Petitioners' "Factual History" and "Procedural History" are irrelevant to

the issues for which they seek review by this Court, Respondent will note the misstatements as required by Revised Rule 15.2.⁷

While Petitioners *contend* that the Sales and Service Agreement ("Agreement") at issue herein requires that Ford sell its medium and heavy trucks to its dealers "only at 'published' prices and discounts", to represent such as a "fact" is entirely misleading.⁸ (Petition at 7) The Agreement does not

⁷ The factual disputes underlying the complaint and Ford's responses thereto are outlined in detail in the Eleventh Circuit's opinions found at *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 380 F.3d 1331 (11th Cir. 2004) (*Bayshore I*), while the relevant procedural history of the case is outlined at *In re Ford Motor Co.*, 471 F.3d 1233, 1236-45 (11th Cir. 2006) (*Bayshore II*).

⁸ Petitioners have misrepresented to several courts that a binding summary judgment was entered against Ford on this issue in a prior action in Texas state court. While a summary judgment was entered and the damages case tried on that summary judgment, the jury returned a verdict of "no damages". On cross-appeals of the zero damage award by plaintiff and of the summary judgment by Ford, the Dallas Court of Appeals noted: "[W]e now turn to whether the trial court erred in granting [plaintiff's] motion for partial summary judgment on this cause of action. However, we must address Ford's contention that the trial court erred in this respect only if we conclude there is reversible error in connection with the jury's zero damage award. In other words, if the record reveals the zero damage award was appropriate, any trial court error in granting the summary judgment on liability would be harmless. Accordingly, we begin our review with [plaintiff's] challenge to the jury finding on damages". *Ford Motor Company v. Metro Ford Truck Sales, Inc.*, 1999 WL 1126280, *5 (Tex.App.-Dallas). The Court of Appeals affirmed the jury's zero damage award, and never reached the summary judgment. *Id.*, at *6. Therefore, because

(Continued on following page)

say that Ford will sell its trucks to its dealers only at published prices, and Ford denies that such is or ever was the understanding of the parties. Moreover, the Eleventh Circuit, in reversing the summary judgment previously entered for Ford on the interpretation of the contract, held that Ford's interpretation of the contract was not the *only* reasonable interpretation. *Bayshore I*, 380 F.3d at 1336.

Again, the statement that the Dealers were "required" to use Ford's Competitive Price Assistance Program ("CPA Program"), that Ford set its wholesale delivered prices higher than those at which the Dealers could resell the trucks, or that they "had" to use the CPA Program (Petition at 7), are all *allegations*, not "facts". To the contrary, in the *Bayshore I* opinion, in finding that the Sales and Service Agreement was not a contract of adhesion, the Eleventh Circuit observed that:

[G]iven the facts before us, we cannot see how these franchise dealership contracts could be considered contracts of adhesion. . . . The facts do not suggest . . . that the Dealers lacked bargaining power or economic strength of their own. For example, there is no evidence that the Dealers would not have been able to secure dealerships from competitor

the appellate court did not reach the summary judgment, there was no finality, rendering it moot. *Hicks v. Quaker Oats*, 662 F.2d 1158, 1168 (5th Cir. 1981).

truck manufacturers. . . . Further buttressing this conclusion are the Dealers' descriptions of themselves as very successful commercial enterprises with nationwide markets and customer bases.

Bayshore I, 380 F.3d at 1338, n. 7.

Ford has no idea to whom Petitioners refer in making their statement that "according to experts in economics, Ford's CPA program allowed Ford to appropriate all or most of the consumer surplus from the dealer's retail sales. . . ." as there has been no such "expert" testimony in this case or any other of which counsel is aware. In fact, in ruling on Ford's motion for summary judgment on Metro Ford Truck Sales' Sherman Act antitrust claim, the United States District Court for the Northern District of Texas held that:

. . . Metro was free to decide its own price. . . . Ford set only wholesale prices, which it is legally entitled to do. [citations omitted] Ford's CPA program is actually pro-competitive. The effect of the discount program is to lower retail prices to customers and increase interbrand competition. . . .

Metro Ford Truck Sales, Inc. v. Ford Motor Company, 1997 WL 671323, at *4 (Oct. 20, 1997), *aff'd*, 145 F.3d 320 (5th Cir. 1998).

⁹ (Petition at 7)

Contrary to Petitioners' assertion, Ford did not set its wholesale price or use its CPA program in order to limit, nor in fact did it limit, the Dealers' profit to between \$0 and 2% at any other level. (Petition at 7) Again, Petitioners confuse allegations with "facts". The Dealers were in control of their own sales of trucks to customers and the prices at which they did so. Discovery demonstrates that the Dealers routinely sold trucks at prices well in excess of the "street price" at which they represented to Ford they would be selling the trucks to their customers. Ford was not the only manufacturer which utilized a wholesale price adjusting mechanism to respond to competition from other manufacturers. As noted by the District Court in *Metro*, the Eighth Circuit found in *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845-46 (8th Cir. 1983), that Mack did not engage in vertical price fixing pursuant to its sales assistance program, which provided wholesale discounts for dealers so that they could meet retail price competition. *Metro*, 1997 WL 671323 at *4.

Ford misappropriated nothing from the Dealers. (Petition at 7) The CPA Program was designed to help the Dealers respond to competition from other truck manufacturers. The reduction in wholesale price to the Dealers was intended to be passed along to the consumer. Petitioners seek an after-the-fact reduction in wholesale prices in order to increase their own profits at the expense of both Ford and the consumer.

C. Counterstatement of Procedural History

The misstatement that all federal claims were eliminated by amendment has been addressed above.

Petitioners' statement that the certification of the class by the Ohio Court of Common Pleas was "affirmed all the way to the Ohio Supreme Court" is incorrect. (Petition at 10) The Ohio Court of Appeals affirmed the certification order but the Ohio Supreme Court simply denied Ford's petition for review of that decision, an outcome that falls far short of being affirmed by the Supreme Court. *Connelly v. Balkwill*, 174 F.Supp. 49, 60, 11 Ohio Op. 2d 289, 83 Ohio L. Abs. 513 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960) (Ohio Supreme Court's denial of motion to certify is no more than an indication that the court does not consider controversy one of public or great general interest).

Petitioners' discussion of their efforts to have this case dismissed under Rule 41(a)(2) are both irrelevant and misleading. In their recitation of their several Rule 41(a)(2) motions to dismiss, they assert that the Circuit Court did not reach their Due Process argument for dismissal. (Petition at 11, n. 6) That is not entirely accurate. In *Bayshore II*, 471 F.3d at 1259, in addressing Petitioners' argument that judicial economy somehow compelled reversal of the District Court's denial of their Rule 41(a)(2) motion, the Circuit Court reviewed the time the District Court had invested in this case, and concluded that "judicial economy points us in a direction wholly

contrary to the Dealers' position." The Circuit Court went on to observe that Petitioners had no "right" to a dismissal, that Rule 41(a)(2) exists chiefly to protect defendants, that based on the record, the denial by the trial court "was not, and could not have constituted, an abuse of discretion." *Id.*

As to the statement that "[t]he Eleventh Circuit did not reach the Due Process argument the dealers made for final dismissal", what the Circuit Court said was that having found that the District Court lacked the authority to enjoin the Dealers from participating in the *Westgate*¹⁰ litigation, that "they [were] free to do so." *Bayshore II*, 471 F.3d at 1258. Thus, the Court noted that it "need not consider whether the Due Process Clause of the Fifth Amendment grants them a substantive right to litigate their claims in an Ohio state court." However, the Court went on and found that the Dealers had no "clear and indisputable right" to a Rule 41(a)(2) dismissal because, among other things, they retain adequate alternative relief. *Id.* at 1259.

Petitioners also assert that the District Court's Rule 12(b)(6) dismissal of their ADDCA claim was really a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1).¹¹ That misstatement is addressed in detail below.

¹⁰ No. CV 02 483526; *Westgate Ford Trucks Sales, Inc. v. Ford Motor Company*; In the Court of Common Pleas, Cuyahoga County, Ohio. Referenced by Petitioners.

¹¹ Petition at 23

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. The Eleventh Circuit Correctly Ruled that the District Court Retains the Discretion to Exercise Supplemental Jurisdiction Following an Involuntary Dismissal on the Merits of One or More Federal Claims

1. This Court's *Rockwell* Decision Has Nothing to Do with The Case Before it Here

Petitioners' reliance on this Court's decision in *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) for the proposition that dismissal is mandated is misplaced. This case is governed not by *Rockwell*, which is an original jurisdiction case, but by the discretionary exercise of supplemental jurisdiction under § 1367(c)(3) as recognized in this Court's decisions in *Osborn v. Haley*, 549 U.S. 225, 244-45 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-51 (1988); and *Rosado v. Wyman*, 397 U.S. 397, 403-05 (1970).

Petitioners cite *Rockwell* for the proposition that where federal *claims* have been dismissed from a case via amended complaint, subject matter jurisdiction is lost. Petitioners overreach the holding in that case. *Rockwell* was a *qui tam* action arising under the Federal False Claims Act ("FCA") in which plaintiff sought to establish status as an "original source".

This Court discussed at length the subject matter jurisdictional significance of the *qui tam* plaintiff's standing as the "original source" of the claims at issue, finding that requirement to be a matter of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A). *Rockwell*, 549 U.S. at 467-68. ("Here the jurisdictional nature of the original-source requirement is clear *ex visceribus verborum*.").

In *Rockwell*, Plaintiff Stone originally alleged facts that supported his status as an "original source". 549 U.S. 457, 463-64. Later, after the United States had intervened as a plaintiff, the government and Stone jointly filed an amended complaint which deleted those factual allegations and substituted others which did not involve Stone as the "original source". *Id.* at 464-65. The voluntary amendment deleted the allegations upon which subject matter jurisdiction over Stone's claim was dependent and these amended allegations were incorporated in the pretrial order. *Id.* at 465, 474. In that context, this Court held that the amended complaint and pretrial order superseded the original complaint and that the deletion of the requisite jurisdictional allegations deprived the federal courts of subject matter jurisdiction under the False Claims Act, 31 U.S.C. § 3730(e)(4). (*Id.*)

The key to the *Rockwell* decision is the observation by this Court that, "[D]emonstration that the original allegations were false will defeat jurisdiction. [citations omitted] So also will the withdrawal of those allegations, unless they are replaced by others

that establish jurisdiction." *Id.* at 473. Disproof of jurisdictional allegations or, as occurred in *Rockwell*, amendment to remove them, is quite different from the granting of a motion to dismiss under Rule 12(b)(6). The amendment of the jurisdictional factual allegations as occurred in *Rockwell* supersedes the original jurisdictional allegations, leaving the District Court with no allegations on which to base subject matter jurisdiction *ab initio*.

Thus, *Rockwell* deals with the jurisdictional consequences of a plaintiff who voluntarily pleads away the factual allegations that give rise to original jurisdiction. *Rockwell* had nothing whatsoever to do with § 1367(c)(3) supplemental jurisdiction.

2. As Recognized by the Eleventh Circuit, this Case Has Nothing to Do with *Pintando*

The Eleventh Circuit's decision in *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007) cited to *Rockwell* for a very basic proposition, that an amended pleading supersedes the prior pleading. *Id.* at 1243. *Pintando* announced no new principles of jurisdiction in that regard.

In *Pintando*, plaintiff alleged state and federal claims for relief. Defendant moved for summary judgment on all claims. While the motion was pending, plaintiff voluntarily amended his complaint to delete the one and only federal claim for relief. The district court thereafter granted summary judgment

on the state law claims. On appeal from the summary judgment, the Eleventh Circuit, citing *Rockwell*, simply held that the amended complaint superseded the original complaint, divesting the district court of subject matter jurisdiction. *Pintando*, 501 F.3d at 1243-44. There were no other federal claims involuntarily dismissed in *Pintando* that would have triggered application or discussion of § 1367(c)(3) supplemental jurisdiction.

3. There Has Been No Voluntary Elimination of the Federal Claims by Amendment

As discussed in more detail below, Petitioners' ADDCA claim was involuntarily dismissed under Rule 12(b)(6) on Ford's motion. The Third Amended Complaint deleting their RPA claim but restating the ADDCA claim did not change that fact. The Agreed Order noting that: "**Plaintiffs' Dealer Day in court Act claims *are dismissed and remain dismissed by operation of the Court's January 10, 2000 Order*** and are not revived and were not intended by any party to be revived by the subsequent filing of the Third Amended Complaint. . . ." did not change that fact. (Resp. App. 91-92) (Emphasis added)

Although in its January 22, 2008, dismissal order, the District Court stated that the inclusion of the ADDCA claim was the result of a "scrivener's error", there is nothing in the record to support such a conclusion. Ford challenged the "scrivener's error"

comment in its Motion to Alter or Amend the Judgment. In its order denying that motion, the District Court noted Ford's objection and responded that it was of no moment how the inclusion of the ADDCA claim is characterized, it was of no legal effect and its inclusion as if it never happened.¹² While Ford agrees that it does not matter whether the ADDCA claim was included in the Third Amended Complaint, it disagrees that it is "as if it never happened" or that the parties treated it as such.

The Circuit Court correctly concluded that "the [district] court *involuntarily* dismissed plaintiffs' claims under the [ADDCA]." (App. 5) Those are the jurisdictional facts and nothing has occurred to change them.

4. The District Court Retained Supplemental Jurisdiction Following the Involuntary Dismissal of the ADDCA Claim

a. The Eleventh Circuit's Decision is Entirely in Accord with the Jurisprudence Interpreting § 1367(c)

The decision of the Eleventh Circuit below is entirely in accord with the provisions of § 1367(c)(3), this Court's prior decisions, those of the other Circuit Courts and 185 years of jurisprudence reaching back

¹² (App. 7-9)

to the doctrine of pendent claim jurisdiction which had its roots in this Court's decision in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 823, 6 L.Ed. 204 (1824) ("[W]hen a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it"). See also 16 MOORE'S FEDERAL PRACTICE (3d ed.) § 106.04[2] (2009). The involuntary dismissal of the ADDCA claim did indeed set in stone the District Court's discretion to exercise supplemental jurisdiction under § 1367(c)(3).

Section 1367(c) provides that: "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction. . . ." The dismissal of a federal claim under Rule 12(b)(6) is a dismissal on the merits. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n. 3, 101 S. Ct. 2424, 2428 n. 3 (1981); *Harris v. Blue Cross/Blue Shield of Alabama, Inc.*, 951 F.2d 325, 328 (11th Cir. 1992); *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990); and 2 MOORE'S FEDERAL PRACTICE (3d ed.) § 12.34[6][a] (2009).

This Court's interpretation of Art. III and § 1367(c)(3) clearly support the Eleventh Circuit's holding that the district court retained the discretion to exercise jurisdiction over Petitioners' remaining state law claim after it had involuntarily dismissed

the ADDCA claim as observed by this Court in *Osborn v. Haley*, 549 U.S. 225, 245 (2007) (“[E]ven if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain Jurisdiction. . . .”); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (“[W]hen a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over pendent state-law claims.”); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-51 (1988) (when federal character of removed case is eliminated while the case is *sub judice*, court has discretion to retain jurisdiction, to remand, or to dismiss); and *Wyman*, 397 U.S. at 403-05 (district court retained discretion to exercise pendent jurisdiction over state law claim after federal claim which formed basis for original jurisdiction was rendered moot).

There are no facts in *Rockwell*, and no holding, observation or even *dicta* to the effect that where one or more federal questions have been disposed of on the merits by the District Court, a subsequent amendment of the complaint that in fact dropped those allegations from the complaint, would supersede the action of the District Court in dismissing the claim on the merits, thereby depriving the court of subject matter jurisdiction. What Petitioners overlook is that it is the ***action of the trial court*** in disposing of the federal question(s) that is determinative of the court’s continuing jurisdiction under § 1367(c),

not their post-dismissal deletion of the claim from the complaint.

The circuit courts are in accord. *Gary v. Long*, 59 F.3d 1391, 1400 (D.C. Cir. 1995) (whether to decide pendent claims is left to the sound discretion of district court), *cert. den.*, 516 U.S. 1011, 1016 (1995); *Gary v. Washington Metro Area Transit Authority*, 516 U.S. 1011 (1995); *Purgess v. Sharrock*, 33 F.3d 134, 138 (2nd Cir. 1994) (If dismissal of federal claim occurs "late in the action, after there has been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary."); *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed."); *Palmer Hosp. Auth.*, 22 F.3d 1559, 1568 (11th Cir. 1994) ("Th[e] power to retain jurisdiction after the dismissal of the underlying federal claim has not been altered by section 1367."); *Evans v. City of Marlin, Tex.*, 986 F.2d 104, 109, n. 10 (5th Cir. 1993) (Where summary judgment for defendant on sole federal claim upheld on appeal but reversed on state law claims, "On remand, the district court will not have the federal question 'hook' on which it can hang the pendent state law claims. However . . . the court is vested with discretion to decide whether or not supplemental jurisdiction continues to be appropriate."). See generally, 16 MOORE'S FEDERAL PRACTICE

(3d ed.) § 106.66[1] 2009 (“Dismissal of supplemental claims is not required after jurisdiction-conferring claim has been dismissed.”).

The Eleventh Circuit correctly concluded that the District Court retained the discretion to exercise jurisdiction over the remaining state law breach of contract claim, following the involuntary dismissal of the ADDCA claim and deletion of the RPA claim.

b. Even if Petitioners Had Amended to Eliminate the ADDCA Claim Following the District Court’s Involuntary Dismissal of that Claim, it Would Make Absolutely No Difference

Even had there been an amendment to delete the previously dismissed ADDCA claim from the live pleading as found by the District Court, the court retained the discretion to exercise § 1367(c) supplemental jurisdiction as the dismissed claim’s jurisdictional shadow continued to extend over the remainder of the case for purposes of § 1367(c). As noted in Wright, Miller & Kane, 6 FEDERAL PRACTICE AND PROCEDURE, CIVIL 2d § 1476 (2009), where a plaintiff’s claim has been dismissed by the trial court, and plaintiff elects to amend in compliance with the court’s ruling, plaintiff should not thereby waive the right to appeal that ruling.

A rule that a party waives all objections to the court’s dismissal if he elects to amend is

too mechanical and seems to be a rigid application of the concept that a Rule 15(a) amendment completely replaces the pleading it amends. Without more, the action of the amending party should not result in completely denying the right to appeal the court's ruling.

There was nothing new or novel about this Court's observation in *Rockwell* that an amended pleading supersedes prior pleadings. Professors Wright, *et al.*, were certainly aware of that principle when they wrote the observation quoted above. *See*, Wright, *et al.*, *id.* at § 1476. ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified. . . .") Citing *dicta* from the Tenth Circuit's opinion in *Blazer v. Black*, 196 F.2d 139, 143-44 (10th Cir. 1952), Professors Wright, *et al.*, note that a party who amends his pleading to conform to a court ruling waives only those objections to that order insofar as it applies to technical defects in the pleading; he does not waive his exceptions to rulings that strike a "vital blow" to a substantial portion of his claim. *Id.*

The Circuit Courts have followed the rule advocated by Professor Wright, *et al.* since at least 1978. In *Wilson v. First Houston Inv. Corp.*, 566 F.2d 1235 (5th Cir. 1978), plaintiff sued under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-14 ("IAA") as well as Rule 10b-5, 17 C.F.R. § 240.10b-5. The district court dismissed plaintiff's complaint and

first amended complaint, after which plaintiff appealed. In his first complaint, plaintiff asserted a private right of action under the IAA and a Rule 10b-5 claim. The trial court dismissed on the ground that no private right of action existed under the IAA and plaintiff had failed to allege a valid 10b-5 claim. Plaintiff was given leave to amend, which he did, again attempting to state a 10b-5 claim but dropping the IAA claim. His complaint was again dismissed and he appealed. The first question addressed by the Circuit Court was whether the dropping of the IAA claim following a dismissal with leave to amend waived the right to appeal same. The Fifth Circuit held that while as a general rule an amended complaint supersedes the original complaint unless the amended complaint specifically refers to or adopts the earlier pleading, plaintiff, "by filing an amended complaint **after a dismissal with leave to amend**, was not barred from raising on appeal the correctness of the dismissal order." *Wilson*, 566 F.2d at 1238 (Emphasis added).

The Eleventh Circuit followed *Wilson* in *Varnes v. Local 91, Glass Bottle Blowers*, 674 F.2d 1365, 1370 (11th Cir. 1982), in holding that where the district court, **with plaintiff's consent**, dismissed the original complaint with leave to amend for failure to state a claim, **plaintiff in fact drafted the order of dismissal** and filed an amended complaint: "Varnes was not barred, by consenting to the dismissal and filing the amended complaint, from raising on appeal the correctness of the dismissal order. . . ." *Id.* See

also, *Dunn v. Airline Pilots Ass'n*, 193 F.3d 1185, 1191 (11th Cir. 1999) ("[W]e do not require a party to replead a claim following a dismissal under Rule 12(b)(6) to preserve objections to the dismissal on appeal.").

Thus, the ADDCA claim had continuing viability for purposes of appeal. That is precisely why Petitioners left it in their Third Amended Complaint,¹³ although they need not have done so to preserve the issue for appeal. Even after appeal, affirmance of the dismissal of the federal claims and remand, the case law is clear, the District Court retains the discretion to exercise supplemental jurisdiction over the remaining state law claims. See *Evans*, 986 F.2d at 109, n. 10.

IV. THE ADDCA CLAIM WAS NOT DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

A. Ford's Motion to Dismiss Was a Motion to Dismiss on the Merits

Petitioners attempt to re-write the facts of this case by *asserting* that the Rule 12(b)(6) dismissal of the ADDCA claim was really a Rule 12(b)(1) dismissal.¹⁴ While there can be overlap between motions

¹³ (Resp. App. 18-26)

¹⁴ For example, in their brief to the Eleventh Circuit on Ford's appeal of the dismissal by the District Court, Petitioners
(Continued on following page)

under Rules 12(b)(1) and 12(b)(6), that clearly is not what happened here. As this Court observed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction; i.e., the courts' statutory or constitutional power to adjudicate the case." Ford's motion to dismiss the ADDCA claim was unquestionably a motion going to the absence of a valid cause of action and did not implicate the District Court's subject matter jurisdiction.

Ford moved under Rule 12(b)(6) to dismiss the ADDCA claim for failure to allege facts sufficient to constitute coercion under the Act. While the ADDCA does contain a jurisdictional factual element, the absence of which could be the subject of a Rule 12(b)(1) motion, those facts were never put at issue here. The ADDCA states that:

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce . . . by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer. . . .

15 U.S.C. § 1222.

acknowledge that, "The DDCA claim was dismissed on January 19, 2000, under F.R.C.P. 12(b)(6). . . ." (Resp. App. 99)

"Commerce" is defined as "commerce among the several States of the United States or with foreign nations. . . ." (15 U.S.C. § 1221(d)) That is, the ADDCA applies only to automobile dealers *engaged in interstate or international commerce*. *Stadium Chrysler Jeep, L.L.C. v. Daimlerchrysler Motors Company LLC*, 324 F.Supp.2d 587594 (D. N.J. 2004) ("In order to make out a claim, a plaintiff must demonstrate that: '(2) the defendant must be an 'automobile manufacturer' engaged in commerce. . . .')") Thus, the "jurisdictional facts" for purposes of the ADDCA, are that the defendant "automobile manufacturer [is] engaged in interstate or international commerce" as defined by the Act.¹⁵

Here, Petitioners alleged that: "This Court has jurisdiction over this proceeding in accordance with 28 U.S.C. § 1331 because certain causes of action alleged herein arise under the laws of the United States, including but not limited to, 15 U.S.C. § 1221

¹⁵ The "engaged in commerce" element of an ADDCA claim is analogous to the employer "engaged in an industry affecting commerce" element of Title VII, 42 U.S.C. § 2000e(b). In *Arbaugh*, 546 U.S. 500, 126 S. Ct. 1235, 1239 (2006), the Court held that the requirement of 15 or more employees was an element of a Title VII claim but not a jurisdictional element. The question whether defendant was an employer "engaged in an industry affecting interstate commerce", a much broader exercise of Congress' Commerce Power than at issue here, would have been a matter of subject matter jurisdiction was not raised there.

et seq. . . .”¹⁶ Petitioners also alleged that: “Defendant Ford Motor Company is engaged in interstate commerce. . . .”¹⁷ (*Id.* at ¶ 2) These allegations are incorporated into Petitioners’ ADDCA claim.¹⁸ These are the jurisdictional factual allegations under the ADDCA.

The ADDCA battle was waged not over whether Ford was engaged in “commerce” but whether Petitioners had met the “coercion” element of their claim as that term is used in the Act. Petitioners alleged that “Ford used its size and power to coerce and intimidate the named Plaintiffs and other dealers into using the Appeal-Level CPA discount program to their detriment”¹⁹ and that “[t]he [ADDCA] has further been violated . . . by . . . Ford’s discriminatory, coercive and unfair treatment of the named Plaintiffs and dealers in the pricing of Medium/Heavy Trucks. . . .”²⁰

¹⁶ Complaint and Petition for Class Action (“Complaint”) (Resp. App. 2); Second Amended Complaint and Petition for Class Action (“Second Amended Complaint”) (Resp. App. 10); and Third Amended Complaint and Petition for Class Action (“Third Amended Complaint”) (Resp. App. 19), all at ¶ 1.

¹⁷ *Id.*, at ¶ 2.

¹⁸ Complaint at ¶ 24 (Resp. App. 4); Second Amended Complaint at ¶ 63 (Resp. App. 12); Third Amended Complaint at ¶ 63 (Resp. App. 22)

¹⁹ Second Amended Complaint at ¶ 66 (Resp. App. 13)

²⁰ *Id.* at ¶ 67.

Ford moved under Rule 12(b)(6) to dismiss the ADDCA claim as well as the RPA and breach of contract claims for failure to state claims for relief. As to the ADDCA claim, Ford argued, *inter alia*, that in order to prove the lack of good faith element under the Act, "a party must plead and prove actual or threatened coercion or intimidation by the manufacturer."²¹ Ford argued further that "in order to state a Dealer Act claim, the alleged coercive or intimidating conduct must reflect a wrongful demand by a manufacturer that would result in sanctions should a dealer fail to comply."²² Nowhere in Ford's motion is there a suggestion that it was not engaged in interstate commerce or that the District Court otherwise lacked subject matter jurisdiction.

Petitioners' own opposition to Ford's motion demonstrates that they did not view the issue as one of subject matter jurisdiction. They argued that because the motion included and referred to matters outside the record and pleadings, it must be denied as a Rule 12 motion to dismiss.²³ Of course, there is no prohibition on presenting matters outside the record

²¹ Memorandum of Law of Ford Motor Company in Support of its Motion to Dismiss the Plaintiffs' Second Amended Complaint and Petition for Class Action (Resp. App. 48-49)

²² *Id.*

²³ Plaintiffs' Response to Ford's Motion to Dismiss (Resp. App. 56-57 and n. 1)

to support a motion to dismiss under Rule 12(b)(1),²⁴ demonstrating that Petitioners viewed the motion as a Rule 12(b)(6) motion. Petitioners also argued cases specifically addressing notice pleading under Rule 8(a), the acceptance of allegations on their face, the propriety of a Rule 12(b)(6) motion pre-discovery, that dismissal was premature and that a ruling on their ability to prove coercion should await a Rule 56 motion.²⁵ Petitioners argued that "The pleadings support and the jury could find that Ford's conduct constitutes a wrongful demand and coercive behavior. . . ."²⁶ and that "[T]he issue of coercion or intimidation under the Act is inherently fact-specific and is thus a jury question not susceptible to a ruling on a motion to dismiss."²⁷ Thus, Petitioners addressed the merits of their claim, not the District Court's subject matter jurisdiction.

The District Court's Order stated generally in response to Ford's motions challenging the ADDCA, RPA and breach of contract claims that:

When considering a Rule 12(b)(6) motion to dismiss, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiffs. . . .

²⁴ *Land v. Dollar*, 330 U.S. 731, 735, n. 4 (1947) (the district court has authority to consider matters outside the pleadings under Rule 12(b)(1)).

²⁵ (Resp. App. 56-72)

²⁶ (Resp. App. 66)

²⁷ (Resp. App. 67)

A Rule 12(b)(6) motion to dismiss should be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their allegations which would entitle them to relief.²⁸

Specifically with regard to the ADDCA claim, the District Court observed that "Ford also moves to dismiss the plaintiffs' Dealers' Day in Court claim for failure to allege a lack of good faith involving coercion, intimidation, or a threat thereof."²⁹ The District Court cited the case law interpreting the special meaning given to the phrase "good faith" as used in the ADDCA,³⁰ reviewed Petitioners' arguments that their allegations were sufficient to constitute coercion under the ADDCA and found that:

[A]s Judge Evans correctly concluded in *Capital Ford Truck Sales, Inc. v. Ford Motor Company*, 819 F.Supp. 1555 (N.D., Ga. 1992), a manufacturer is free to set its wholesale price or its price discounts at whatever level the manufacturer chooses without running afoul of the Dealers' Day in Court Act. *Id.* at 1566-67. As such, Ford's demand, explicit or

²⁸ Order dated January 19, 2000 [corrected February 2, 2000] (Resp. App. 74-90)

²⁹ (Resp. App. 82)

³⁰ (Resp. App. 82) (citing *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985) ("In the absence of coercion, intimidation or threats thereof, there can be no recovery under the Act, even if the manufacturer otherwise acts in 'bad faith' as that term is normally used.")).

implicit, that the plaintiffs participate in the CPA program or pay inflated published wholesale prices is not a wrongful demand and does not constitute coercion or bad faith within the meaning of the Dealers' Day in Court Act. Consequently, the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim is **GRANTED**.

In their Appellees' Brief (Res. App. 95-100) filed in the appeal *Bayshore Ford Truck Sales, Inc. v. Ford Motor Company*, No. 08-12587 (11th Cir. Nov. 10, 2008) (*Bayshore III*), Petitioners describe the dismissal of their ADDCA claim as a Rule 12(b)(6) dismissal. (Resp. App. 99)

Petitioners' ADDCA claim was clearly dismissed on the merits because of an inability to allege facts sufficient to constitute "coercion" under the Act. Thus, this is not a situation in which plaintiffs' claim was dismissed for lack of subject matter jurisdiction.

B. Petitioners' ADDCA Claim Was Not Insubstantial

Petitioners invite this Court to find that because their ADDCA claim was dismissed early in the case under Rule 12(b)(6), the claim was "insubstantial" and therefore cannot support jurisdiction. All that is required to invoke the district court's § 1331 jurisdiction is a "colorable claim". (*Arbaugh*, 546 U.S. at 513.) A finding by a District Court that a claim is without merit does not render the claim "insubstantial". ("[W]hen a court grants a motion to dismiss for

failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over pendent state-law claims.") (*Id.* at 514.) Petitioners' suggestion makes no more sense than arguing that because a claim has been dismissed under Rule 12(b)(6), imposition of Rule 11 sanctions are automatically justified. Petitioners vigorously argued that Ford's Appeal CPA Program constituted coercion under the ADDCA, while the District Court rejected the argument it did not treat it as a frivolous contention, and the Circuit Court obviously did not view it as "insubstantial".

V. SECTION 1367(c)(3) REQUIRES NO NOVEL INTERPRETATION

Petitioners suggest that the Court adopt a novel interpretation of § 1367(c) to harmonize a supposed conflict between subsections (a) and (c)(3) of § 1367. However, what they seek to do is not to harmonize but to repeal § 1367(c)(3).

Petitioners' suggestion that a dismissed claim no longer has any jurisdictional significance if it is later deleted from the complaint as a plaintiff cleans up its pleadings is wrong as noted above.

Moreover, petitioners' thesis that § 1367 looks only to "extant" federal claims, ignores both the plain language of § 1367(c)(3) and the case law. Section 1367(c) clearly provides that: "the district courts may decline to exercise supplemental jurisdiction over a

claim under subsection (a) if . . . (3) *the district court has dismissed* all claims over which it has original jurisdiction. . . ." Petitioners point to the wording in § 1367(a) that the district courts shall have supplemental jurisdiction over other claims that are so related to "*claims in the action*". (Emphasis added). Petitioners postulate that claims that have been "dismissed" by the district courts are no longer "in the action". But if that were true, then a plaintiff would have no right to appeal them as they are no longer "in the action". Obviously, the district court has no power involuntarily to dismiss claims and take away a plaintiff's right to appeal because the dismissed claims are still part of the action. This is true even after an appeal and remand. *See, e.g., Evans*, 986 F.2d at 109, n. 10. The federal claims, having been filed and involuntarily disposed of by the district court, remain a part of the action for purposes of subject matter jurisdiction.

If the Court were to adopt Petitioners' proposed interpretation of § 1367(c), a plaintiff, having lost one or more of its federal claims on the merits, could unilaterally divest the district court of its jurisdiction and grant itself a new opportunity to litigate the federal claims.³¹ Such is clearly not in the interests of judicial economy, the courts or parties.

³¹ Rule 41(a)(2) is not available to a defendant to oppose a motion for leave to drop a claim as opposed to dismissing the entire complaint. While a defendant could oppose a motion for leave to amend made under Rule 15(a)(2), that Rule provides

(Continued on following page)

Moreover, it is in the best interests of the Court and the parties that a litigant be allowed to clean up its pleadings without inadvertently waiving its right to appeal a prior adverse ruling. Petitioners' proposal is simply a trap for the unwary.

The existing jurisprudence interpreting § 1367(a) and (c)(3) is perfectly consistent. Where the court has original jurisdiction over one or more claims, it has the discretion under § 1367(a) to exercise supplemental jurisdiction over other claims that are so related as to arise out of the same case or controversy. The dismissal of the federal claims *by the district court* enables the court to exercise its discretion to retain or dismiss the remaining claims, even after the pleadings have been cleaned up to drop the reference to the dismissed claim and even if the dismissal has been affirmed on appeal and the case remanded for trial of the remaining claims. Nothing more is needed.

that leave is to be freely given in the interests of justice. *U.S. Fawcetts, Inc. v. Home Depot USA, Inc.*, No. 1:03-CV-1572-WSD, N.D. Ga., Jan. 13, 2006; *Transwitch Corp. v. Galazar Networks, Inc.*, 377 F.Supp.2d 284, 288 (D. Mass. 2005) (Rule 41(a)(2) applies to dismissal of an action as opposed to Rule 15(a) as a vehicle to drop some but not all claims). Petitioner's re-write of the jurisprudence of § 1367 would require a re-write of Rule 15(a)(2) and its jurisprudence to state that leave should be freely given except where the amendment would have the effect of defeating the court's subject matter jurisdiction after a dismissal on the merits of one or more claims.

VI. CONCLUSION

The Petition is based on fundamentally incorrect statements of fact relating to the jurisdictional events in this case. This is not a case in which the federal claims were voluntarily eliminated by amendment. Instead, one federal claim was dismissed on the merits under Rule 12(b)(6) while the other was deleted by amendment. This case is not governed by *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) but instead by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The Eleventh Circuit correctly ruled that the District Court had the discretion to exercise subject matter jurisdiction over this case.

Respectfully submitted,

DATED: April 17, 2009

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Resp. App. 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA ROME DIVISION**

**BAYSHORE FORD
TRUCK SALES, INC.,
HEINTZELMAN'S TRUCK
CENTER, INC., LJL
TRUCK CENTER, INC.,
PEACH STATE FORD
TRUCK SALES, INC., And
VALLEY FORD TRUCK
SALES, INC., Individually
and as Representatives
for a Class of Similarly
Situated Entities,**

Plaintiffs,

vs.

**FORD MOTOR
COMPANY,**

Defendant.

**COMPLAINT -
CLASS ACTION**

**CIVIL ACTION NO.
4:99-CV 0173-HLM**

**COMPLAINT AND PETITION
FOR CLASS ACTION**

(Filed July 1, 1999)

Plaintiffs Bayshore Ford Truck Sales, Inc., Heintzelman's Truck Center, Inc., Peach State Ford Truck Sales, Inc., LJL Truck Center, Inc., and Valley Ford Truck Sales, Inc., individually and as representatives for a class of similarly-situated entities, hereby sue Defendant Ford Motor Company.

Resp. App. 2

1. This Court has jurisdiction over this proceeding in accordance with 28 U.S.C. §1331 because causes of action herein arise under the laws of the United States, including, but not limited to, 15 U.S.C. *et seq.* *et seq.*

1367 in that such claims are so related to claims over which this Court has original jurisdiction that they form the same case or controversy under Article III of the United States Constitution.

2. Venue is proper in this district in accordance with 28 U.S.C. §1391 and 15 U.S.C. §15 and 15 U.S.C. §1222. Defendant Ford Motor Company is engaged in interstate commerce. Defendant Ford Motor Company does business in this district and in this division. Defendant Ford Motor Company is found in this district and in this division. Defendant Ford Motor Company has agents, that is, dealers, in this district and in this division which have entered into franchise agreements and which sell heavy trucks. In addition, Plaintiff Peach State Ford Truck Sales, Inc. is a corporation doing business in this district, including purchasing heavy trucks from Ford and selling said heavy trucks. Thus, a substantial part of the acts or omissions giving rise to the claims alleged herein occurred in this district. Other dealers and potential class members also do business in this district and in this division.

3. Plaintiff Bayshore Ford Truck Sales, Inc. is a Delaware corporation with its principal place of business in New Castle, Delaware. Bayshore began as a Ford dealer in 1976, and is one of the largest Ford heavy-truck dealers in the

* * *

21. Plaintiffs specifically adopt and incorporate by reference herein in this Count One all preceding paragraphs as if fully set forth herein.

22. Ford materially breached the terms of the franchise agreement with its dealers, including the Plaintiffs herein, by not publishing all prices, charges, discounts and other terms of sale, and by not selling company products of like grade and quality to its dealers in accordance with such published pricing. These actions by Ford affected virtually every dealer in the country in the same manner. This breach of contract by Ford has proximately caused damages to Plaintiffs and other dealers who are members of the class asserted in excess of approximately \$300,000,000, for all of which Plaintiffs hereby sue.

23. Plaintiffs allege that they are entitled to collect from Ford their costs and reasonable attorneys'

fees for pursuing this action, for all of which Plaintiffs hereby sue.

**COUNT TWO: VIOLATION OF THE
DEALER DAY IN COURT ACT**

24. Plaintiffs specifically adopt and incorporate by reference herein in this Count Two all preceding paragraphs as if fully set forth herein.

25. By virtue of its improper control of dealer profits, by its discriminatory, coercive and unfair treatment of dealers in the pricing of trucks of like grade and quality and other equipment in violation of its contract obligations, and by its breach of basic issues of fairness in the business market place, Ford has violated the duties imposed by the federal Dealer Day in Court Act, 15 U.S.C. §1221, Ford has failed to act in good faith and/or has acted in bad faith in not performing or complying with the terms and provisions of the franchise agreement, in particular, with ¶10 in the Heavy Duty Truck Sales and Service Agreement. These violations by Ford affected each class member in similar or identical fashion and resulted in damages proximately caused, for all of which Plaintiffs hereby sue.

26. Plaintiffs allege that they are entitled to collect from Ford their costs and reasonable attorneys' fees for pursuing this action, for all of which Plaintiffs hereby sue.

27. Plaintiffs specifically adopt and incorporate by reference herein in this Count Three all preceding paragraphs as if fully set forth herein.

28. By virtue of its admitted discrimination in the pricing of trucks of like grade and quality sold to dealers, Ford has engaged in price discrimination in violation of the federal Robinson-Patman Act, 15 U.S.C. §13(a). Plaintiffs also assert that discovery will show that Ford likewise discriminated in the pricing of other Ford products, including replacement parts. This price discrimination is without just cause or excuse, was undertaken intentionally, maliciously and in bad faith, and proximately caused damages to each class member, including the

* * *

Respectfully submitted,

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Resp. App. 6

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

BAYSHORE FORD TRUCK	*
SALES, INC., HEINTZEL-	*
MAN'S TRUCK CENTER,	*
INC., LJL TRUCK CEN-	* CIVIL ACTION NO.
TER, INC., PEACH STATE	* 4:99-CV-173-RLV
FORD TRUCK SALES,	*
INC., and VALLEY FORD	*
TRUCK SALES, INC.,	*
individually and as Repre-	*
sentatives for a Class of	*
Similarly Situated Entities,	*
Plaintiffs,	*
vs.	*
FORD MOTOR COMPANY,	*
Defendant.	*

SECOND AMENDED COMPLAINT
AND PETITION FOR CLASS ACTION

(Filed Oct. 21, 1999)

COME NOW Plaintiffs Bayshore Ford Truck Sales, Inc., Heintzelman's Truck Center, Inc., Peach State Ford Truck Sales, Inc., LJL Truck Center, Inc., and Valley Ford Truck Sales, Inc., individually and as representatives for a class of similarly-situated entities, and, pursuant to Fed.R.Civ.P. 15 and this Court's Order of September 21, 1999, file this their Second Amended Complaint and Petition for Class

Action against Defendant Ford Motor Company. The claims asserted in this Second Amended Complaint and Petition arise out of the same transactions, occurrences and conduct made the subject of and set forth in Plaintiffs' original Complaint and the Amendment thereto, and accordingly, this Amended Complaint and Petition relates back to the filing of Plaintiffs' original Complaint.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this proceeding in accordance with 28 U.S.C. § 1331 because certain causes of action alleged herein arise under the laws of the United States, including, but not limited to, 15 U.S.C. § 1221 et seq., 28 U.S.C. § 2201, et seq. and 15 U.S.C. § 13. In addition, this Court has jurisdiction over other claims alleged herein pursuant to 28 U.S.C. § 1367 in that such claims are so related to claims over which this Court has original jurisdiction that they form the same case or controversy under Article III of the United States Constitution.

2. Venue is proper in this district in accordance with 28 U.S.C. § 1391 and 15 U.S.C. §§ 15 and 1222. Defendant Ford Motor Company is engaged in interstate commerce. Defendant Ford Motor Company does business in this district and in this division. Defendant Ford Motor Company is found in this district and in this division. Defendant Ford Motor Company has franchised dealers in this district and in this division which have entered into franchise

agreements and which sell Ford products. In addition, Plaintiff Peach State Ford Truck Sales, Inc. and Plaintiff LJL Truck Center, Inc. are corporations which do business in this district. Thus, a substantial part of the acts or omissions giving rise to the claims alleged herein occurred in this district. Other dealers and potential class members do business in this district and in this division.

PARTIES

3. Plaintiff Bayshore Ford Truck Sales, Inc. (hereinafter "Bayshore") is a Delaware corporation with its principal place of business in New Castle, Delaware. Bayshore became a Ford dealer in 1976 and sold Ford Medium-Duty and Heavy-Duty Trucks, which are generally those trucks designated as Series 600 or above and which are hereinafter collectively referred to as "Medium/Heavy Trucks". Bayshore sold such trucks pursuant to franchise agreements until 1998, at which time Ford Motor Company sold its division which manufactured Medium/Heavy Trucks to HN-80 Corporation, a division of Freightliner Corporation. That sale is not the subject of this action. Plaintiff Bayshore was one of the highest-volume Ford Medium/Heavy Truck dealers in the country. Bayshore services a nationwide market and has customers throughout the United States.

4. Plaintiff Heintzelman's Truck Center, Inc. (hereinafter "Heintzelman's") is a Florida corporation with its principal place of business in Orlando,

Florida. Heintzelman became a Ford Medium/Heavy Truck dealer in 1973 and sold Ford Medium/Heavy Trucks pursuant to franchise agreements until 1998. Plaintiff Heintzelman's was one of the highest-volume Medium/Heavy Truck dealers in the Southeastern United States. Heintzelman services a nationwide market.

* * *

named Plaintiffs, proximately causing these other dealers harm similar to that sustained by the named Plaintiffs. Other dealers are entitled to recover damages in the same fashion as the named Plaintiffs.

**COUNT TWO: VIOLATION OF THE
DEALER DAY IN COURT ACT**

63. Plaintiffs incorporate herein paragraphs 1 through 62 above as if fully set forth herein.

64. Ford's breaches of the franchise agreements as set forth in Count One with respect to the named Plaintiffs and to other Ford franchised dealers were willful and intentional and in bad faith, and such conduct is moreover a breach of the duty of good faith and fair dealing inherent in every contract and violates the Dealer Day in Court Act, 15 U.S.C. § 1221 *et. seq.*

65. Ford instituted the Appeal-Level CPA discount program so as to achieve the improper objective of circumventing its contractual obligations

to publish to each named Plaintiff and other dealers the prices, charges, discounts and other terms of sale and to sell its products, including Medium/Heavy Trucks and Replacement Parts, only at published prices, charges, discounts and other terms of sale.

66. Ford used its size and power to coerce and intimidate the named Plaintiffs and other dealers into using the Appeal-Level CPA discount program to their detriment.

67. The Dealer Day in Court Act has further been violated with respect to the named Plaintiffs and other Ford franchised dealers by at least the following: (a) Ford's improper manipulation and control of the named Plaintiffs' profits and other dealers' profits; (b) Ford's discriminatory, coercive and unfair treatment of the named Plaintiffs and dealers in the pricing of Medium/Heavy Trucks of like grade and quality and Replacement Parts in violation of Ford's contractual obligations; and (c) Ford's breach of basic issues of trust and fairness in the business marketplace.

68. Ford has failed to act in good faith and/or has acted in bad faith in not performing or complying with the terms and provisions of the franchise agreement, in particular, but not limited to, ¶ 10 in the franchise agreements executed by the named Plaintiffs and in the identical or substantially similar paragraphs contained in the franchise agreements of other Ford dealers.

69. Ford's violation of the Dealer Day in Court Act has proximately caused Plaintiffs' harm and damages, including but not limited to: each named Plaintiff was unaware of the lowest price at which Ford sold comparable Medium/Heavy Trucks and Replacement Parts to other Ford dealers; each named Plaintiff paid more to Ford for certain comparable Medium/Heavy Trucks and Replacement Parts than did other dealers, and consequently, each named Plaintiff's profits on the resale of such Medium/Heavy Trucks and Replacement Parts were wrongly reduced; each named Plaintiff lost sales; and each named Plaintiff lost profits on service.

70. Ford's violation of the Dealer Day in Court Act has proximately caused damages to each named Plaintiff in an amount in excess of one million dollars and to other dealers, and each named Plaintiff is entitled to recover some or all of the following:

(A) lost profits on sales made equal to the overcharges Ford imposed on said dealers in their purchases of Ford products;

(B) lost profits on sales lost equal to the net profits dealers could have earned on the initial sales of Ford products had those sales been made;

(C) lost profits on sales of service and parts for Medium/Heavy Trucks that dealers did not sell but that would have been sold – and hence serviced – had Ford not violated the law; and

(D) loss of use of monies that Ford illegally kept from dealers (the overcharges) or that Ford prevented dealers from earning, equal to the level of interest such monies would have earned if in the possession of the dealers from the time such monies would have been earned by dealers to the date of trial.

71. Ford's violations of the Dealer Day in Court Act affected each named Plaintiff and each class member in similar or identical fashion, proximately causing each named Plaintiff and other dealers harm. Other dealers therefore are entitled to recover damages in the same fashion as the named Plaintiffs.

**COUNT THREE: VIOLATION OF
THE ROBINSON-PATMAN ACT**

(c) that the Plaintiffs and the putative class members be awarded costs and expenses, including reasonable attorneys' fees;

(d) that the Plaintiffs and the putative class members be awarded actual damages to be determined at the time of trial;

(e) that the Plaintiffs and the putative class members be awarded treble damages as provided by law;

(f) that the Plaintiffs and the putative class members be awarded pre-judgment and post-judgment interest as proscribed by law;

(g) that the Plaintiffs and the putative class members have such other and further relief as the Court deems just and proper under the circumstances; and

(h) that the Plaintiffs and the putative class members have a trial by jury.

Respectfully submitted,

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Resp. App. 17

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

BAYSHORE FORD TRUCK	*
SALES, INC., HEINTZEL-	*
MAN'S TRUCK CENTER,	*
INC., LJL TRUCK CEN-	* CIVIL ACTION NO.
TER, INC., PEACH STATE	* 4:99-CV-173-RLV
FORD TRUCK SALES,	*
INC., and VALLEY FORD	*
TRUCK SALES, INC.,	*
individually and as Repre-	*
sentatives for a Class of	*
Similarly Situated Entities,	*
Plaintiffs,	*
vs.	*
FORD MOTOR COMPANY,	*
Defendant.	*

**THIRD AMENDED COMPLAINT
AND PETITION FOR CLASS ACTION**

(Filed Dec. 6, 2002)

COME NOW Plaintiffs Bayshore Ford Truck Sales, Inc., Heintzelman's Truck Center, Inc., Peach State Ford Truck Sales, Inc., LJL Truck Center, Inc., and Valley Ford Truck Sales, Inc., individually and as representatives for a class of similarly-situated entities, and, pursuant to Fed.R.Civ.P. 15 and this Court's Order of [REDACTED], file this their Third Amended Complaint and Petition for Class

Action against Defendant Ford Motor Company. The claims asserted in this Third Amended Complaint and Petition arise out of the same transactions, occurrences and conduct made the subject of and set forth in Plaintiffs' original Complaint and the Amendments thereto, and accordingly, this Amended Complaint and Petition relates back to the filing of Plaintiffs' original Complaint.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this proceeding in accordance with 28 U.S.C. § 1331 because certain causes of action alleged herein arise under the laws of the United States, including, but not limited to, 15 U.S.C. § 1221 et seq. and 28 U.S.C. § 2201, et seq. In addition, this Court has jurisdiction over other claims alleged herein pursuant to 28 U.S.C. § 1367 in that such claims are so related to claims over which this Court has original jurisdiction that they form the same case or controversy under Article III of the United States Constitution.

2. Venue is proper in this district in accordance with 28 U.S.C. § 1391 and 15 U.S.C. § 1222. Defendant Ford Motor Company is engaged in interstate commerce. Defendant Ford Motor Company does business in this district and in this division. Defendant Ford Motor Company is found in this district and in this division. Defendant Ford Motor Company has franchised dealers in this district and in this division which have entered into franchise agreements and

which sell Ford products. In addition, Plaintiff Peach State Ford Truck Sales, Inc. and Plaintiff LJI Truck Center, Inc. are corporations which do business in this district. Thus, a substantial part of the acts or omissions giving rise to the claims alleged herein occurred in this district. Other dealers and potential class members do business in this district and in this division.

PARTIES

3. Plaintiff Bayshore Ford Truck Sales, Inc. (hereinafter "Bayshore") is a Delaware corporation with its principal place of business in New Castle, Delaware. Bayshore became a Ford dealer in 1976 and sold Ford Medium-Duty and Heavy-Duty Trucks, which are generally those trucks designated as Series 600 or above and which are hereinafter collectively referred to as "Medium/Heavy Trucks". Bayshore sold such trucks pursuant to franchise agreements until 1998, at which time Ford Motor Company sold its division which manufactured Medium/Heavy Trucks to HN-80 Corporation, a division of Freightliner Corporation. That sale is not the subject of this action. Plaintiff Bayshore was one of the highest-volume Ford Medium/Heavy Truck dealers in the country. Bayshore services a nationwide market and has customers throughout the United States.

4. Plaintiff Heintzelman's Truck Center, Inc. (hereinafter "Heintzelman's") is a Florida corporation with its principal place of business in Orlando, Florida. Heintzelman became a Ford Medium/Heavy

Truck dealer in 1973 and sold Ford Medium/Heavy Trucks pursuant to franchise agreements until 1998. Plaintiff Heintzelman's was one of the highest-volume Medium/Heavy Truck dealers in the Southeastern United States. Heintzelman services a nationwide market.

* * *

60. Ford's breaches of the franchise agreements were willful and intentional.

61. Ford's breaches of the franchise agreements proximately caused damages to each named Plaintiff in an amount in excess of one million dollars and to other dealers, and each named Plaintiff is entitled to recover some or all of the following:

(A) lost profits on sales made equal to the overcharges Ford imposed on said dealers in their purchases of Ford products;

(B) loss of use of monies that Ford illegally kept from dealers (the overages) or that Ford prevented dealers from earning, equal to the level of interest such monies would earn if in the possession of the dealers from the time such monies would have been earned by dealers to the date of trial.

62. Ford breached material provisions of the franchise agreements of other dealers in the same manner as it did with the named Plaintiffs, proximately causing these other dealers harm similar to that sustained by the named Plaintiffs. Other dealers

are entitled to recover damages in the same fashion as the named Plaintiffs.

**COUNT TWO: VIOLATION OF THE
DEALER DAY IN COURT ACT**

63. Plaintiffs incorporate herein paragraphs 1 through 62 above as if fully set forth herein.

64. Ford's breaches of the franchise agreements as set forth in Count One with respect to the named Plaintiffs and to other Ford franchised dealers were willful and intentional and in bad faith, and such conduct is moreover a breach of the duty of good faith and fair dealing inherent in every contract and violates the Dealer Day in Court Act, 15 U.S.C. § 1221 *et. seq.*

65. Ford instituted the Appeal-Level CPA discount program so as to achieve the improper objective of circumventing its contractual obligations to publish to each named Plaintiff and other dealers the prices, charges, discounts and other terms of sale and to sell its products, including Medium/Heavy Trucks and Replacement Parts, only at published prices, charges, discounts and other terms of sale.

66. Ford used its size and power to coerce and intimidate the named Plaintiffs and other dealers into using the Appeal-Level CPA discount program to their detriment.

67. The Dealer Day in Court Act has further been violated with respect to the named Plaintiffs

and other Ford franchised dealers by at least the following: (a) Ford's improper manipulation and control of the named Plaintiffs' profits and other dealers' profits; (b) Ford's discriminatory, coercive and unfair treatment of the named Plaintiffs and dealers in the pricing of Medium/Heavy Trucks of like grade and quality and Replacement Parts in violation of Ford's contractual obligations; and (c) Ford's breach of basic issues of trust and fairness in the business marketplace.

68. Ford has failed to act in good faith and/or has acted in bad faith in not performing or complying with the terms and provisions of the franchise agreement, in particular, but not limited to, ¶ 10 in the franchise agreements executed by the named Plaintiffs and in the identical or substantially similar paragraphs contained in the franchise agreements of other Ford dealers.

69. Ford's violation of the Dealer Day in Court Act has proximately caused Plaintiffs' harm and damages, including but not limited to: each named Plaintiff was unaware of the lowest price at which Ford sold comparable Medium/Heavy Trucks and Replacement Parts to other Ford dealers; each named Plaintiff paid more to Ford for certain comparable Medium/Heavy Trucks and Replacement Parts than did other dealers, and consequently, each named Plaintiff's profits on the resale of such Medium/Heavy Trucks and Replacement Parts were wrongly reduced; each named Plaintiff lost sales; and each named Plaintiff lost profits on service.

70. Ford's violation of the Dealer Day in Court Act has proximately caused damages to each named Plaintiff in an amount in excess of one million dollars and to other dealers, and each named Plaintiff is entitled to recover some or all of the following:

(A) lost profits on sales made equal to the overcharges Ford imposed on said dealers in their purchases of Ford products;

(B) lost profits on sales lost equal to the net profits dealers could have earned on the initial sales of Ford products had those sales been made;

(C) lost profits on sales of service and parts for Medium/Heavy Trucks that dealers did not sell but that would have been sold – and hence serviced – had Ford not violated the law; and

(D) loss of use of monies that Ford illegally kept from dealers (the overcharges) or that Ford prevented dealers from earning, equal to the level of interest such monies would have earned if in the possession of the dealers from the time such monies would have been earned by dealers to the date of trial.

71. Ford's violations of the Dealer Day in Court Act affected each named Plaintiff and each class member in similar or identical fashion, proximately causing each named Plaintiff and other dealers harm. Other dealers therefore are entitled to recover damages in the same fashion as the named Plaintiffs.

PLAINTIFFS' PETITION FOR
CLASS CERTIFICATION

Plaintiffs incorporate herein paragraphs 1 through 71 above as if fully set forth herein.

72. In accordance with Local Rule 23.1(A)(2), Plaintiffs allege the following:

(a) The section of Fed.R.Civ.P. 23 which is claimed to authorize maintenance of suit by class action:

* * *

(e) that the Plaintiffs and the putative class members be awarded pre-judgment and post-judgment interest as proscribed by law;

(f) that the Plaintiffs and the putative class members have such other and further relief as the Court deems just and proper under the circumstances; and

(g) that the Plaintiffs and the putative class members have a trial by jury.

Resp. App. 26

Respectfully submitted this ____ day of ____, 2002

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ATTORNEYS FOR PLAINTIFFS

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA ROME DIVISION**

**BAYSHORE FORD *
TRUCK SALES, INC., *
HEINTZELMAN'S TRUCK *
CENTER, INC., L.J.L. *
TRUCK CENTER, INC., *
PEACH STATE FORD *
TRUCK SALES, INC., And *
VALLEY FORD TRUCK *
SALES, INC., Individually *
and as Representatives *
for a Class of Similarly *
Situated Entities, ***

Plaintiffs, *

v. *

**FORD MOTOR *
COMPANY, ***

Defendant. *

**CIVIL ACTION NO.
4:99-CV-173-RLV**

**PLAINTIFFS' THIRD AMENDED RESPONSES
TO MANDATORY DISCLOSURES**

(Filed May 12, 2003)

(1) State precisely the classification of the cause(s) of action being filed, a brief factual outline of the case including plaintiff's contentions as to what the defendant did or failed to do, and a succinct statement of the legal issues in the case.

Response:

This is a case originally alleging breach of contract and violation of federal statutes by Ford Motor Company brought as a class action by five franchised Ford dealers. The federal Robinson-Patman Act claims have been voluntarily dismissed by the Plaintiffs, and the federal Dealer Day in Court Act claims were dismissed by the trial court by order dated January 19, 2000. The only remaining claim for trial is thus Plaintiffs' state law breach of contract claims.

Ford breached its franchise contract obligations by failing and refusing to publish all prices and discounts for which it would sell Ford-brand products to dealers, including medium and heavy trucks, and by failing to fulfill its obligation to sell those trucks to dealers at published prices and discounts. Ford has admitted that it did not publish actual, true dealer prices to its dealers, that it did not sell all trucks only for published prices and that it sold medium and heavy trucks below the prices that were published to dealers and the documents produced in this case bear this out.

The legal issues raised by this litigation are whether Ford's conduct violated the franchise agreement (this issue has already been adjudicated to final judgment in another proceeding in a different jurisdiction), and the amount of damages suffered by the Plaintiffs proximately caused by Ford's conduct.

(2) Describe in detail all statutes, codes, regulations, legal principles, standards and customs or

usages, and illustrative case law which plaintiff contends are applicable to this action.

Response:

The contracts at issue contain a choice of law provision that Michigan law governs in the event of a dispute. Michigan law provides a cause of action for breach of contract that is identical or virtually identical to that in every other United States jurisdiction. That is, breach of contract is a cause of action found when a contract party fails to fulfill a contract duty and that failure proximately causes damages to the other party. See, e.g., *Admiral Ins. Co. v. Columbia Cats. Ins. Co.*, 194 Mich. App. 300; 486 N.W.2d 351; 358 (Mich. App. 1992) (setting forth the elements of breach of contract in Michigan). Michigan has a six-year statute of limitations for breach of contract actions such as this one. See: Michigan Code Annotated, MCL 600.5807(8); MSA §27A.5807(8). However, the Court may conclude that despite the choice of law provision contained in the contract, Georgia law may apply to the underlying dispute. See, e.g., *Greensboro Ford, Inc. v. Ford Motor Co.*, 568 S.E.2d 758 (Ga.App. 2002). Thus, to the extent that Michigan law differs, Georgia law may appropriately be applied to the underlying dispute.

Ford breached the franchise agreements with the named plaintiffs and the other dealers. These breaches were willful and intentional and in bad faith, and such conduct is a breach of the duty of good faith and fair dealing inherent in every contract and violates

the Dealer Day in Court Act, 15 U.S.C. sec. 1221 et seq. The Dealer Day in Court Act has further been violated in at least the following ways: (a) Ford's improper control and intimidation of the named plaintiffs; (b) Ford's discriminatory, coercive and unfair treatment of the named plaintiffs and dealers in the pricing of Heavy Trucks of like grade and quality and Replacement Parts in violation of Ford's contractual obligations; and (c) Ford's breach of basic issues of trust and fairness in the business market place.

Given that the Dealer Day in Court Act claims have been dismissed from the case at present, they will only be adjudicated following appeal and remand of the claims by the appellate court, where necessary.

(3) Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information. (Attach witness list to Responses to Mandatory Disclosures as Attachment A).

Response:

Witness list attached.

(4) Provide the name of any person who may be used at trial to present evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence. For all experts described in Fed.R.Civ.P. 26(a)(2)(B), provide a separate written report satisfying the provisions of

that rule. (Attach expert witness list and written reports to Responses to Mandatory Disclosures as Attachment B).

Response:

Mr. Fred Kinder will serve as an expert witness. Mr. Kinder has previously furnished his report on the Ford NAVIS and CPA databases, and the damage calculations per Plaintiffs' case theory. Mr. Kinder is also planning to furnish supplemental report(s) following further production of information being withheld by Ford and discovery depositions that are presently contemplated.

(5) Provide a copy of, or a description by category and location of, all documents, data, compilations, and tangible things in your possession, custody, or control that are relevant to disputed facts alleged with particularity in the pleadings. (Attach document list and descriptions to Responses to Mandatory Disclosures as Attachment C).

Response:

Document list attached and supplied in Plaintiffs' amended disclosures.

(6) In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of, describe by category and location of, the documents or other evidentiary materials bearing on the nature and extent of injuries suffered, making such documents or evidentiary material available for inspection and copying as

under Fed.R.Civ.P. 34. (Attach any copies and descriptions to Responses to Mandatory Disclosures as Attachment D).

Response:

Descriptions and damages report attached.

(7) Attach for inspection and copying as under Fed.R.Civ.P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment. (Attach copy of insurance agreement to Responses to Mandatory Disclosures as Attachment E).

Response:

N/A

(8) Disclose the full name, address, and telephone number of all persons or legal entities who have a subrogation interest in the cause of action set forth in plaintiffs' cause of action and state the basis and extent of such interest.

Response:

N/A.

Resp. App. 33

/s/ [Illegible]

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Resp. App. 34

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ATTORNEYS FOR
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2003,
a true and correct copy of the foregoing Plaintiffs'
Third Amended Responses to Mandatory Disclosures
was served via first class mail, postage pre-paid on
the following:

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/s/ [Illegible]

Michael L. McGlamry

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK |
SALES, INC., et al., |

Plaintiffs, |

v. |

FORD MOTOR COMPANY, |

Defendant. |

CIVIL ACTION

NO. 4:99-CV-173-RLV

ORDER

(Filed Oct. 22, 2007)

The parties are directed to file briefs addressing the question of whether *Pintando v. Miami-Dade Housing Agency* ___ F.3d ___ (11th Cir. September 25, 2007), 2007 WL 2768452, requires that this action be dismissed for lack of subject matter jurisdiction. The briefs are to be filed no later than November 2, 2007. No response briefs will be permitted.

SO ORDERED, this 22nd day of October, 2007.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

Resp. App. 36

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK	§	
SALES, INC. HEINTZEL-	§	
MAN'S TRUCK CENTER,	§	
INC. L.J.L TRUCK CENTER,	§	
INC., PEACH STATE FORD	§	
TRUCK SALES, INC., AND	§	
VALLEY FORD TRUCK	§	
SALES, INC., Individually	§	
and as Representatives	§	CIVIL ACTION
for a Class of Similarly	§	NO.: 4:99-CV-0173-RLV
Situated Entities,	§	
Plaintiffs,	§	
vs.	§	
FORD MOTOR COMPANY,	§	
Defendant.	§	

**RULE 12(b)(6) MOTION OF FORD MOTOR
COMPANY TO DISMISS PLAINTIFFS'
SECOND AMENDED COMPLAINT
AND PETITION FOR CLASS ACTION**

(Filed Nov. 8, 1999)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Ford Motor Company moves the Court to dismiss Plaintiffs' Second Amended Complaint and Petition for Class Action against Ford Motor Company for the reason that the Second Amended Complaint and Petition for Class

Action fails to state a claim upon which relief can be granted.

In accordance with Local Rule 7.1(A)(1), Defendant Ford Motor Company contemporaneously files its memorandum in support of this motion, which memorandum is incorporated herein by reference as if fully set forth.

Wherefore, Defendant Ford Motor Company respectfully requests that the Court grant the relief requested herein, and enter an order dismissing Plaintiffs' Second Amended Complaint and Petition for Class Action with prejudice, and grant such other and further relief to which Defendant Ford Motor Company may be entitled.

Respectfully submitted,

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Resp. App. 38

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**ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BAYSHORE FORD TRUCK	§	
SALES, INC. HEINTZEL-	§	
MAN'S TRUCK CENTER,	§	
INC. L.J.L TRUCK CENTER,	§	
INC., PEACH STATE FORD	§	
TRUCK SALES, INC., AND	§	
VALLEY FORD TRUCK	§	
SALES, INC., Individually	§	
and as Representative	§	CIVIL ACTION
for a Class of Similarly	§	NO.: 4:99-CV-0173-RLV
Situated Entities,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
FORD MOTOR COMPANY,	§	
	§	
Defendant.	§	

MEMORANDUM OF LAW OF FORD
MOTOR COMPANY IN SUPPORT OF ITS
MOTION TO DISMISS THE PLAINTIFFS'
SECOND AMENDED COMPLAINT
AND PETITION FOR CLASS ACTION

(Filed Nov. 8, 1999)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Local Rule 7, Defendant, Ford Motor Company ("Ford"), submits this its memorandum of law in support of its motion to dismiss Plaintiffs' Second Amended Complaint and Petition for

Class Action, and would respectfully show this Court as follows:

I. INTRODUCTION

This lawsuit concerns Plaintiffs' complaints about Ford's operation of its "competitive price assistance" program (referred to either as "CPA" or "CPA program"). Ford's CPA program was Ford's principal allowance program for its heavy-trucks and involved certain allowances from Ford to its heavy-truck dealers which were either credited or paid by Ford to its dealers.¹

Plaintiffs complain that Ford's operation of its CPA program violates the contract with its heavy-truck dealers and is a violation of the federal Automobile Dealer's Day in Court Act ("Dealer Act") and the Robinson-Patman Act. The key concept behind Plaintiffs' claims against Ford is their theory that each Plaintiff was entitled to purchase medium and heavy-duty trucks from Ford at the lowest discounted price that Ford offered to any other dealer in the country on what Plaintiffs argue was a "comparable truck."

This is not the first time that a Ford heavy-truck dealer has challenged Ford's CPA program on federal

¹ Ford and HN-80 Corporation, a wholly owned subsidiary of Freightliner Corporation, entered into an agreement in 1997 in which HN-80 Corporation agreed to acquire certain of Ford's heavy-truck assets.

statutory grounds.² There have been two other challenges, each of which was unsuccessful.³ In those two challenges, Ford's CPA program withstood judicial scrutiny on federal antitrust and Dealer Act claims that are very similar to those brought by Plaintiffs in this case. In *Metro Ford Truck Sales, Inc. v. Ford Motor Company*, 145 F.3d 320 (5th Cir. 1998), cert. denied, 119 S. Ct. 390 (Jan. 11, 1999)⁴, the Fifth Circuit Court of Appeals reviewed how Ford operated this exact same CPA program and summarily rejected the plaintiffs' Robinson-Patman Act claims finding

² This is also not the first time that Ford had been sued for breach of contract on the contractual provision at issue in this case. The heavy-truck dealer in Cause No. 94-7174b; *Metro Ford Truck Sales, Inc. v. Ford Motor Company*, in the 44th Judicial District Court of Dallas County, Texas sued Ford for breach of contract. Although Metro prevailed on the liability finding for breach of contract, the jury returned a verdict that Metro suffered zero damages. This case, including the liability finding, is currently on appeal to the Dallas Court of Appeals.

³ In addition, Mack Truck, Inc., one of Ford's competitors, had a program very similar to Ford's CPA program. Mack Truck's version of the CPA program was called "sales assistance program". Mack Truck's operation of its program was considered in *Lewis Service Center, Inc. v. Mack Truck Inc.*, 714 F.2d 842 (8th Cir. 1983). In that case, the Eighth Circuit found that Mack Truck's program was not a violation of the federal antitrust law, but was instead pro-competitive. *Lewis*, 714 F.2d at 848. The *Lewis* Court also found that such programs lower retail prices to consumers and increase interbrand competition. *Id.*; see also *Metro Ford*, 145 F.3d 320.

⁴ *Metro Ford* is the progenitor of this case. The Plaintiffs in this case are represented by the attorney who also represents the dealer in the *Metro Ford* case, Mr. Jim Pikel.

that Ford's operation of its CPA program did not amount to price discrimination as a matter of law. *Metro Ford*, 145 F.3d at 325-26. Likewise, a federal district court in Atlanta summarily rejected a dealer's allegations that Ford violated the Dealer Act and federal antitrust laws because of the manner in which Ford operated its CPA program. *Capital Ford Truck Sales, Inc. v. Ford Motor Company*, 819 F. Supp. 1555, 65-76, 80-83 (N.D. Ga. 1992).

As shown below, Plaintiffs, by their Second Amended Complaint and Petition for Class Action (hereinafter "Complaint"), allege the same federal statutory claims that the *Metro Ford* and *Capital Ford* plaintiffs unsuccessfully alleged against Ford. Similarly, the federal claims asserted by these Plaintiffs, as well as the breach of contract allegation, fail to state a claim upon which relief can be granted; therefore, these claims should be dismissed with prejudice.

II. STATEMENT OF ALLEGED FACTS

The salient facts, as alleged by Plaintiffs and accepted as true for purposes of Ford's motion to dismiss, are as follows⁵: Ford manufactured and sold

⁵ Since Rule 12(b)(6) requires that all well-pleaded be taken as true, Ford liberally quotes from the facts as stated by Plaintiffs in their Complaint. However, Ford is, in no way, adopting these alleged facts as true; rather, the salient facts are being included herein for the Court's convenience.

both medium-duty trucks and heavy-duty trucks from at least 1980 through 1998.⁶ (Complaint, at ¶ 9.) These trucks were typically ordered by dealers for resale to a particular retail customer, and were configured to the retail customer's specifications. (*Id.* at ¶ 12.) Some dealers, including Plaintiffs, operated under the "Ford Heavy-Duty Truck Sales and Service Agreement" and some other dealers operated under the "Ford Truck Sales and Service Agreement." (*Id.* at ¶¶ 15, 16.) These agreements are in all relevant tams identical or substantially identical to one another. (*Id.* at ¶ 21.) Paragraph

* * *

the identity of the retail customer and the proposed retail price. (*Id.* at ¶ 37.) Ford allegedly then, in its sole discretion, would give either no CPA, an insufficient amount of CPA to close the deal, or just enough CPA to allow each dealer to realize a profit margin somewhere between 0 and 4 percent of the total retail price.⁷ (*Id.*) From time to time, according to Plaintiffs, Ford's appeal-level CPA discounts varied by as much as \$15,000 on supposedly "comparable trucks". (*Id.* at ¶ 40.); See Section D(1)(a) *infra*. Plaintiffs define "comparable trucks" for purposes of their claims as

⁶ Although Ford no longer manufactures or sells heavy-duty trucks, it does continue to manufacture and sell medium-duty trucks.

⁷ An allegation very similar to this one was made by the plaintiff and rejected by the court in *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F.Supp. 1555, 1566 (N.D. Ga. 1992).

"trucks [of] the same model, same series, have identical Wholesale Delivered base prices, and have a Total Truck Values (the total Wholesale Delivered Price of the truck, including the base chassis and all options) within plus or minus one percent (1%) of each other." (Complaint, at ¶13.)

In their Complaint, Plaintiffs also allege that Ford operated a secret replacement parts discount program whereby some, but not all, dealers obtained unpublished discounts off Ford's ordinary, published wholesale prices. (Complaint, at ¶ 41 and 43.) However, Plaintiffs also admit that they have no idea if such a program actually existed. (*Id.* at 42.)

III. ARGUMENT IN SUPPORT OF FORD'S MOTION TO DISMISS

A. Standard Of Review.

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires that all well-pleaded facts are to be taken as true; and then it is for this Court to decide whether the facts alleged entitle Plaintiffs to some legal remedy. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). To survive a Rule 12(b)(6) motion, however, Plaintiffs must allege specific facts, not conclusions. *Elliott v. Fofas*, 867 F.2d 877, 881 (5th Cir. 1989). Conclusory allegations and unwarranted factual deductions are not taken as true. *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir.

1974)⁶; *Atlanta Gas Light Co. v. Southern Natural Gas Co.*, 338 F. Supp. 1039, 1041 (N.D. Ga. 1972).

B. Plaintiffs Fail To State A Claim For Breach of Contract.

1. The Terms of the Contract.

Plaintiffs' claim that Ford breached paragraph 10 of the franchise agreement, which paragraph is set forth in their Complaint as follows:

Sales of COMPANY PRODUCTS by the Company to the Dealer hereunder will be made in accordance with the prices, charges, discounts and other terms of sale set forth in price schedules or other notices published by the Company to the Dealer from time to time in accordance with applicable HEAVY DUTY TRUCK TERMS OF SALE BULLETIN or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN. Except as otherwise specified in writing by the Company, such prices, charges, discounts and terms of sale shall be those in effect, and delivery to the Dealer shall be deemed to have been made and the order deemed to have been filed on the date of delivery to the carrier or the Dealer, whichever occurs first. The Company has the right at any time and from time to time to

⁶ Fifth Circuit cases decided before October 1, 1981, are binding precedent in this circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1991) (en banc).

change or eliminate prices, charges, discounts, allowances, rebates, refunds or other terms of sale affecting COMPANY PRODUCTS by issuing a new HEAVY DUTY TRUCK or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN, new price schedules or other notices.

(Complaint, at ¶ 22.). Based on this provision, Plaintiffs allege that Ford "had contractual duties to publish to each named Plaintiff . . . all prices, charges, discounts and other terms of sale, and to sell its products . . . only at published prices." (Complaint, at ¶ 52.)

Plaintiffs admit that Ford published its wholesale delivered prices for trucks and parts to Plaintiffs. (Complaint, at ¶ 34.) Plaintiffs also admit that Ford published its "Rainbow Schedule" and "Sales-Advantage" CPA discounts to Plaintiffs. (Complaint, at ¶ 39.) Accordingly, the

* * *

Therefore, even assuming Ford had published the price reflecting appeal-level CPA amounts on every truck sold to every dealer, the unambiguous terms of paragraph 10 plainly allow Ford to change its truck prices. Thus, Plaintiffs fail to state a breach of contract claim against Ford.

C. Plaintiffs Fail To State A Claim For Relief Under The Automobile Dealer Day In Court.

The "factual" support for Plaintiffs' Dealer Act claim is premised on two notions. Plaintiffs' primary idea is that Ford was contractually required to publish to each of its dealers the appeal-level CPA price that Ford gave to any one of its dealers. (Complaint, at ¶¶ 22, 35, 47 and 48.) A second notion, which Plaintiffs fail to develop in their Complaint, is Ford was contractually required to publish allegedly available, but secret, discounts on replacement parts. (Complaint, at ¶¶ 41-43.) Based on these two notions, Plaintiffs allege that Ford violated the Dealer Act because:

- 1) Ford failed to act with good faith and fair dealing in performance of the contract (Complaint, at ¶¶ 64, 68);
- 2) Ford circumvented the contract by failing to publish its appeal-level CPA discount program (Complaint, at ¶ 65);
- 3) Ford "used its size and power to coerce and intimidate" dealers into using the appeal-level CPA (Complaint, at ¶ 66); and
- 4) Ford improperly manipulated and controlled Plaintiffs' profits by "discriminatory, coercive and unfair treatment" in the pricing of its trucks and replacement parts. . . ." (Complaint, ¶ 67).

As shown below, these allegations – whether viewed collectively or individually – fail to state any claim for relief under the Dealer Act.

1. Plaintiffs Do Not Allege Facts Sufficient to State a Claim Under the Dealer Act.

The Dealer Act authorizes suits by automobile dealers “operating under the terms of a franchise” against manufacturers only when the manufacturer fails “to act in good faith. . . .” 15 U.S.C. §§1221(c) and 1222. By using a standard of “good faith”, it appears at first glance that the act is very broad in its application. However, the Dealer Act gives “good faith” a narrower meaning than it ordinarily may have. “Good faith” is defined by the act as follows:

The term “good faith” shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, that recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

15 U.S.C. §1221(c). The Dealer Act is strictly construed; thus, in order to prove a lack of good faith as is necessary for a claim under the act, a party must plead and prove actual or threatened coercion or

intimidation by the manufacturer. *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *Bob Maxfield Inc. v. American Motors Corp.*, 637 F.2d 1033, 1038 (5th Cir. Unit A Feb. 1981), *cert. denied*, 454 U.S. 860 (1981); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1565 (N.D. Ga. 1992). Likewise, "[a] mere showing of arbitrary or other bad conduct absent coercion is not a sufficient ground for recovery" under the Dealer Act. *H.C. Blackwell Company, Inc. v. Kenworth Truck Co.*, 620 F.2d 104, 106 (5th Cir. 1980).

Also, in order to state a Dealer Act claim, the alleged coercive or intimidating conduct *must reflect a wrongful demand by a manufacturer that would result in sanctions should a dealer fail to comply*. See, e.g., *Colonial Dodge, Inc. v. Chrysler Corp.*, 11 F. Supp. 2d 737, 743 (D. Md. 1996); *Fray Chevrolet Sales, Inc. v. General Motors Corp.*, 536 F.2d 683, 68586 (6th Cir. 1976). As noted by the district court in *Colonial Dodge*, of the ten circuit courts of appeals that have addressed this issue, all ten have held that coercion or intimidation must include a wrongful demand that is accompanied by a threat of sanctions for noncompliance. *Colonial Dodge*, 11 F. Supp. 2d at 743 (citing cases from the first through ten circuit courts of appeals that require a wrongful demand

accompanied by a threat of sanctions).⁹ Therefore, for Plaintiffs to allege coercion or intimidation as required to state a claim under the act, they must allege a wrongful demand by Ford directed to Plaintiffs that would result in sanctions against Plaintiffs if the demand was not met.

Nothing in the Complaint comes close to stating that Ford coerced or intimidated Plaintiffs through a wrongful demand that, if not complied with, would result in sanctions against Plaintiffs by Ford. Instead, Plaintiffs' merely allege that (1) the dealers were required to disclose the customer's identity and the previously agreed upon retail price to Ford, (2) Ford did not publish prices as Plaintiffs claim Ford was required to do under the contracts between Ford and the Plaintiffs, and (3) Ford operated a secret parts discount program. (Complaint, at ¶ 37.) Therefore, Plaintiffs have failed to allege a lack of "good

⁹ However, in the case of *Stamps v. Ford Motor Co.*, 650 F. Supp. 390 (N.D. Ga. 1986) (Shoob, J.), a district court declined to apply the "wrongful demand" standard because the court believed that the standard had not been addressed by the Eleventh Circuit. *Stamps*, 650 F. Supp. at 396, n.5. It appears that the *Stamps* Court did not consider the binding precedent of *H.C. Blackwell v. Kenworth Trucking Company*, 620 F.2d 104, 106 (5th Cir. 1980). In *Blackwell*, the court stated that for purposes of the Dealer Day Act "[b]ad faith may consist of coercive conduct manifested by 'a wrongful demand which will result in sanctions if not complied with.'" This statement from *Blackwell* was adopted by the court in *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 829 F.Supp. 1555, 1566 (N.D. Ga. 1992).

faith" by Ford as required to state a claim under the Dealer Act.

2. The Dealer Act Does Not Apply to an Alleged Breach of Contract.

Central to Plaintiffs' Dealer Act claim is their allegation that Ford breached its contracts with Plaintiffs by not publishing to all of its dealers the appeal-level CPA provided to any one dealer. (Complaint, ¶¶ 64, 65 and 68). The Dealer Act does not create a cause of action or remedy for breach of contract. *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 710 (10th Cir. 1970); *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645, 646 (3rd Cir. 1964); *Quarles v. General Motors Corp.*, 597 F. Supp. 1037 (D.C.N.Y. 1984), *aff'd* 758 F.2d 839 (2nd Cir. 1985); *General Motors Corp. v. MAC Co.*, 247 F.Supp. 723, 731 (D. Colo. 1965). Moreover, allegations that a manufacturer insisted on its contractual rights do not state a Dealer Act claim. *Clifford Jacobs Motors, Inc. v. Chrysler Corp.*, 357 F.Supp. 564, 574 (W.D. Ohio 1973). Therefore, Plaintiffs' breach of contract allegations fail to state a claim under the Dealer Act.

3. Allegations that Ford Actions Were in Bad Faith or Unfair do Not State a Claim Under the Dealer Act.

Also, Plaintiffs claim that Ford's actions violate the Dealer Act because they were in bad faith and unfair. (Complaint, ¶¶ 64, 67 and 68). Allegations of

this nature do not state a claim under the Dealer Act. As the court in *American Honda* succinctly observed,

[c]ase law is clear that a manufacturer fails to act in good faith for purposes of recovering under this Act only if its conduct amounts to coercion or intimidation. In absence of coercion, intimidation or threats thereof, *there can be no recovery under the Act, even if the manufacturer otherwise acts in 'bad faith' as that term is normally used.*

American Honda, 773 F.2d at 1210 (emphasis added). Likewise, claims that a manufacturer's actions were unfair do not state a Dealer Act claim. *See also, Pearson v. Ford Motor Co.*, 865 F. Supp. 1504, 1511 (N.D. Fla. 1994) (automobile manufacturer's alleged "lack of fairness" in contractual performance does not give rise to a Dealer Act claim). Therefore, Plaintiffs fail to state a Dealer Act claim against Ford.

4. Plaintiffs' Allegations Concerning Their Profits are not Sufficient to State a Claim.

In addition, the remaining allegation that Plaintiffs make in support of their Dealer Act claim does not support a claim under the act. Plaintiffs allege that Ford improperly manipulated and controlled Plaintiffs' profits by "discriminatory, coercive and unfair treatment" in the pricing of its trucks and replacement parts. . . ." (Complaint, ¶¶ 66, 67).

A similar allegation was made by a Ford dealer and rejected by the court in *Capital Ford Truck Sales, Inc. v. Ford Motor Company*, 819 F. Supp. 1555 (N.D. Ga. 1992). In considering that allegation, the *Capital Ford* Court rejected plaintiff's argument, observing that,

[t]he cornerstone of Plaintiffs' Dealer Act claims is the assertion that Ford Motor structured its pricing system so as to restrict dealer profits to a level insufficient for Capital Ford to remain in business. It is beyond dispute, however, that a manufacturer is free to set prices at any level it chooses. The claim that manufacturer price levels are set too high, or fail to provide a sufficient profit margin for dealers, is *insufficient to give rise to a cognizable claim under the Dealer Act*.

Id. at 1566 (emphasis added) (citing *Overseas Motors, Inc. v. Import Motors, Ltd.*, 519 F. 2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975)). Thus, Plaintiffs' allegations regarding their profit margin fail to state a claim under the Dealer Act. For the above reasons, Plaintiffs fail to state a claim for relief under the Dealer Act, and that claim should be dismissed with prejudice.

D. Plaintiffs Fail To State A Claim Under The Robinson-Patman Act.

Plaintiffs' complaint that Ford violated Section 2(a) of the Robinson-Patman Act is based on the same allegations that Plaintiffs claim support their other

causes of action – Ford sold trucks and replacement parts to some dealers at prices and discounts that were not published to all dealers. (Complaint, at ¶73.) As with Plaintiffs' other claims, these allegations do not state a claim under the Robinson-Patman Act.

* * *

(W.D.N.Y. 1991) (could not satisfy two purchaser rule because plaintiff had not purchased vehicles of similar type).

Since only bidders on the *same* contract are in competition with each other, Plaintiffs' claims that they successfully bid for some truck sales under *different* contracts during the relevant time period fails to qualify it as a competing purchaser under the Act, as was expressly held in *M.C. Manufacturing*, 517 F.2d at 1066-67. Once the award is made, the bidders are simply no longer competitors. Subsequent sales of vehicles to each successful bidder to fulfill the contracts (or portions of contracts) that they have already won are not sales to competing customers. *Id.* Since Plaintiffs have not pled and cannot satisfy the two-purchaser rule, Plaintiffs' Robinson-Patman claim should be dismissed with prejudice.

IV. CONCLUSION

For all of the reasons stated above, this Court should grant the motion to dismiss of Ford Motor Company and dismiss Plaintiffs' Second Amended

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Complaint And Petition For Class Action with prejudice.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Bayshore Ford Truck Sales, Inc., Heintzelman's Truck Center, Inc., Peach State Ford Truck Sales, Inc. and Valley Ford Truck Sales, Inc., individually and as representatives for a class of similarly situated entities,	§	
	§	
	§	Civil Action No.
	§	4:99-cv-173-RLV
	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
Ford Motor Company,	§	
	§	
Defendant.	§	

PLAINTIFFS' RESPONSE
TO FORD'S MOTION TO DISMISS

(Filed Nov. 26, 1999)

COME NOW Plaintiffs and file their response to Ford Motor Company's ("Ford's") Motion to Dismiss. Ford's Motion and Memorandum of Law do not support the relief Ford seeks. Plaintiffs have properly pleaded their claims in conformity with Fed.R.Civ.P. 8 and this Court's directive. Thus, on the merits, Ford's Motion should be denied. In addition, Ford's Motion includes and refers to matters outside the record and pleadings in this case, and so it must be denied as a

Rule 12 motion to dismiss.¹ Ford's Motion also does not accurately cite to case authority and expressly cites cases for propositions that are not contained in those cases; hence, Ford's Motion lacks legal authority. Finally, the applicable and controlling case law supports the Plaintiffs' contention that Ford's Motion must be denied. Every case Ford cites as authority for its legal arguments was a case decided either on summary judgment or after trial on the merits; not a single case cited by Ford is one granting a motion to dismiss.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE APPLICABLE STANDARD AND FORD'S BURDEN

Ford must establish that Plaintiffs have failed to state a cause of action upon which relief may be

¹ See *Lowe v. Town of Fairland, Okla.*, 143 F.3d 1378 (10th Cir.1998); *Property Mgt. Investments v. Lewis*, 752 F.2d 599 (11th Cir.1985). Discovery has yet to commence. This Court should not convert Ford's motion into one for summary judgment, in that Plaintiffs have not been allowed to develop evidence with which to respond. This is particularly true here, where Ford has refused to agree that Plaintiffs can review the record in other similar litigation which would allow Plaintiffs to respond to Ford's "evidence." See generally, Plaintiffs' Motion for Scheduling Order, and Plaintiffs' Memorandum in support, both of which were filed on or about November 1, 1999. If this Court is inclined to treat this Motion to Dismiss as a Motion for Summary Judgment, Plaintiffs urge the court to grant them discovery and additional time to respond.

granted. One commentator described this burden as follows:

When considering a 12(b)(6) motion, the court presumes that all the allegations of the complaint are true; it resolves all doubts or inferences in the plaintiff's favor; and it reads the complaint in the light most favorable to the plaintiff. . . . Because the plaintiff is given every benefit of the doubt in both law and fact, the 12(b)(6) motion theoretically requires the movant to "play out" every factual scenario that could be contained in the four corners of the complaint, and then apply the applicable legal standards. Similarly, every plausible legal theory that might provide relief to the plaintiff, based on the facts pleaded, must be considered.

Haig, *Business and Commercial Litigation in Federal Courts*, Vol. 1, page 324-25 (West 1998). See also *Bowers v. Hardwick*, 478 U.S. 186, 202 (1986), (complaint should not be dismissed merely because plaintiff's allegations do not support the particular legal theory he advances; the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory); *Scheurer v. Rhodes*, 416 U.S. 232, 234 (1974) (when reviewing the sufficiency of a complaint before the reception of any evidence, the court's task is a limited one; the issue is not whether the plaintiff will prevail but whether the claimant is entitled to offer evidence in support of the claims); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness*

Development Corp., 711 F.2d 984, 995(11th Cir. 1983) (motion to dismiss should be denied unless defendant shows beyond doubt that plaintiffs can prove no set of facts entitling them to relief). This standard is particularly true in an antitrust suit where the proof and details of the alleged violations are largely in the hands of the alleged violators. See *id.* at 995. See also **Municipal Utilities Bd. Of Albertsville v. Alabama Power Co.**, 934 F.2d 1493, 1501 (11th Cir. 1991) (notice pleading is all that is required for a valid antitrust complaint). Plaintiffs here have alleged violations of the Robinson-Patman Act, 15. U.S. C. § 13(a), which is a count alleging violations of the antitrust laws.

All inferences, both factual and legal, must be indulged in support of the plaintiffs' claims. **Conley v. Gibson**, 355 U.S. 41, 45-46 (1957); **Miree v. Dekalb County, Georgia**, 433 U.S. 25, 27 n.2 (1977); **Davis v. Monroe County Bd. of Educ.**, ___ U.S. ___, 119 S.Ct. 1661, 1676 (1999). Because of the Constitutional implications, this reluctance to grant motions to dismiss is more than a mere theoretical construct. A motion to dismiss, if granted, not only deprives the plaintiffs of their Constitutional right to trial, but also denies plaintiffs' their ability to conduct discovery that may lead to facts that would entitle them to trial. Thus, the motion to dismiss is generally reserved for situations where the legal issues are clear and undisputed, such as when a case is precluded by the statute of limitations, **Uboh v. Reno**, 141 F.3d 1000 (11th Cir. 1998), or where governmental immunity

is plainly evident, *McCallum v. City of Athens, Georgia*, 976 F.2d 649 (11th Cir. 1992). Such motions are inappropriate where fact issues must be developed to determine whether the plaintiff's allegations are viable. "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

Ford ignores this standard in its Motion and in the accompanying Memorandum. Rather than citing cases and presenting argument to the effect that Plaintiffs have failed to state a claim for which relief could be granted, Ford cites and relies on cases in far different procedural postures, in particular, cases that have been resolved on motion for summary judgment. See, e.g., *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F.Supp. 1555 (N.D.Ga.1992) (*Capital Ford II*);² *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1993). These decisions, and others cited by Ford, were rendered after discovery had been undertaken. In urging this Court to grant its Motion to Dismiss in reliance on these inapposite cases, Ford seeks the benefit of situations

² In an earlier decision more pertinent to the inquiry here, the court denied Ford's motion to dismiss. See *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 779 F.Supp. 1345 (N.D.Ga.1990) (*Capital Ford I*).

wherein the *facts*, not the pleadings, were found wanting. This Court should not dismiss this action before Plaintiffs are allowed to discover and present that which might not have been presented in other cases.

II. PLAINTIFFS' ALLEGATIONS

This Court already has some familiarity with Plaintiffs' allegations, in that the Court reviewed Plaintiffs' Complaint and Defendant's Motion for More Definite Statement. Plaintiffs filed their Second Complaint and Petition for Class Action ("Second Complaint") on or about October 21, 1999. Therein, Plaintiffs, which are franchised Ford dealers, have brought three distinct but factually-related claims against Ford: breach of contract; violation of the Dealer Day in Court Act, 15 U.S. C. § 1221 *et. seq.*; and violation of the Robinson-Patman Act, 15 U.S. C. § 13(a).

Rule 8(a) requires that Plaintiffs set forth a short and plain statement of the claim showing that they are entitled to relief. Here, Plaintiffs have alleged a valid contract supported by adequate consideration that Ford has breached by failing to publish prices, charges, discounts and other terms of sale, and by failing to sell its products in accordance with such published prices, charges, discounts and other terms of sale. *See* Second Complaint at ¶¶s 22, 49-58. Ford can deny these allegations, but it cannot contend that the allegations do not provide Ford with notice of the

claims, and it cannot credibly contend that these allegations do not state a claim upon which relief can be granted.

In alleging violations of the Dealer Day in Court Act, Plaintiffs alleged that Ford instituted the Appeal-Level CPA program³ to circumvent its contractual obligations and duties and used its size and power to coerce and intimidate Ford dealers into using the Appeal-Level CPA discount program. Second Complaint at ¶¶s 65-66. Again, these allegations inform Ford of Plaintiffs' claim sufficiently to survive a motion to dismiss.

Finally, Plaintiffs have adequately pleaded Ford's violations of the Robinson-Patman Act. Plaintiffs have alleged that Ford sold trucks of like grade and quality to dealers at different prices without justification and that such conduct has harmed both the dealers and competition. Ford clearly has notice of Plaintiffs' claims, and its Motion to Dismiss should be denied.

³ This program is discussed more thoroughly in the Second Complaint at ¶¶s 27-40. In general, this program required dealers to advise Ford of the details of a proposed sale and to seek unpublished discounts from Ford to achieve that sale. Failure to conform usually meant that the dealers failed to make the sale. These allegations are incorporated in Count Two Violation of Dealer Day in Court Act.

III. THE BREACH OF CONTRACT CLAIM IS PROPERLY PLEADED.

A. Breach of Contract is Properly Pleaded.

Under Michigan law, a cause of action for breach of contract requires pleading and proof of the following: (1) the existence of a valid contract [15, 16, 49-56]; (2) breach by the defendant [58]; and (3) damages proximately caused [59-62]. *Dumas v. Auto Club Ins. Ass'n*, 473 N.W. 652, 661 (Mich.1991). Plaintiffs have pleaded these essential elements of breach of contract. The bracketed numbers above correspond to the paragraphs of the Second Complaint where the allegations are found. Since the Court must accept as true all allegations in the Plaintiffs' Second Complaint, Ford's motion to dismiss must be denied.

B. Ford's "defense" to breach of contract is spurious. Ford attempts to circumvent the obvious adequacy of Plaintiffs' Complaint by urging a reading of the franchise agreement that is

* * *

during the pendency of appeal). Under the full faith and credit clause of the United States Constitution, this Court is bound to give conclusive effect to the judgment of liability found against Ford on breach of contract. Ford thus cannot be heard in this Court to reurge its claim that it did not breach the contract.

IV. THE DEALER DAY IN COURT ACT CLAIM IS PROPERLY PLEADED.

A. The Requisite Pleadings. Under 15 U.S.C. §1221, plaintiffs must plead and prove the following: (1) the existence of an automotive dealer/manufacturer relationship [15, 16, 19]; (2) lack of good faith by the manufacturer in performing or complying with any of the terms of the franchise [20, 44-48, 66-68]; and (3) damages proximately caused [69-71]. *Carroll Kenworth Truck Sales, Inc. v. Henwarth Truck Co.*, 781 F.2d 1520, 1525 (11th Cir. 1986). As before, the bracketed numbers above correspond to the paragraphs in Plaintiffs' Second Complaint where the requisite elements are set forth. Ford's motion to dismiss this claim must be denied.

B. Ford's "wrongful demand" argument is false. Ford argues that Plaintiffs were required to plead they were subjected to "a wrongful demand by Ford that would result in sanctions should a dealer fail to comply." Ford's Memorandum, page 9. This is not a correct statement of the law. Ford relies on numerous cases, most of which are cited in *Colonial Dodge, Inc. v. Chrysler Corp.*, 11 F.Supp. 737, 743 (D.Md.1996), *aff'd*, 121 F.3d 697 (4th Cir. 1997). Like almost all of the cases Ford cites, *Colonial Dodge* involved a motion for summary judgment, not a motion to dismiss. Most importantly, *Colonial Dodge* discusses a "wrongful demand accompanied by the threat of sanctions" not as a pleading requirement, but as proof of the coercion or intimidation that

establishes lack of good faith. See *Colonial Dodge*, 11 F.Supp.2d at 743.

No Eleventh Circuit case holds that a wrongful demand accompanied by threat of sanction must be expressly alleged to plead properly a Dealer Day in Court Act claim. Rather, such a demand is one way of showing the requisite "coercion or intimidation" under the Act. In fact, courts in the Eleventh Circuit expressly *do not* follow the "wrongful demand" rule. See *Stamps v. Ford Motor Co.*, 650 F.Supp. 390, 397 fn.5 (N.D. Ga. 1986) (refusing to follow cases imposing a "wrongful demand" requirement). The *H.C. Blackwell v. Kenworth Trucking Co.*⁸ case cited by Ford confirms that a wrongful demand is only one manner of triggering the Act. Blackwell held that "[b]ad faith may consist of coercive conduct manifested by a wrongful demand which will result in sanctions if not complied with." *Id.* at 107. The operative term in this quote is "*may consist of.*" The case does not say that such a demand is the *only* way to plead or prove coercion or intimidation.

C. Plaintiffs have pleaded a "wrongful demand." Even if a wrongful demand is an element which must be pleaded to state a claim pursuant to the Dealer Day in Court Act, which it is not, Plaintiffs have pleaded such a demand. See Second Complaint at ¶¶s 66-68. Construing the Second Complaint and all reasonable inferences therefrom in the light most

⁸ 620 F.2d 104 (5th Cir. 1980).

favorable to Plaintiffs, Plaintiffs have alleged that Ford demanded that dealers participate in the CPA program "or else" suffer unfair, illegal and non-contractual pricing. Through coercion of the economic variety, Ford demanded that dealers use the CPA program in place of the dealer's contractual right to have published, and hence equivalent, pricing. That is, Ford forced dealers to accept the unlawful terms of the CPA program, and the discriminatory prices that system created, under the threat of paying prices far greater than they were entitled to have under the plain language of the franchise agreement. Ford essentially told dealers: "Participate in the CPA program or you will be forced out of business by having to pay exorbitant wholesale prices, greatly in excess of what other dealers are paying for the same products, and greatly in excess of what you are otherwise entitled to pay under your franchise agreement."

A wrongful demand may be implicit as well as overt. "A wrongful demand can be implicit, inferable from facts and circumstances without any showing of a formal one." *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 446 (9th Cir. 1979). See also *Overseas Motors v. Import Motors, Ltd.*, 519 F.2d 119, 124-25 (6th Cir.), *cert. denied*, 423 U.S. 92 (1975) (threats and demands can be implicit as well as overt). In *Sherman*, the court held that a violation of the antitrust laws itself may lead to the conclusion that the Dealer Day in Court Act has been violated. *Sherman*, 601 F.2d. at 446-47. Here, the Plaintiffs

have pleaded an antitrust violation. They have also pleaded a wrongful demand in the form of an implicit threat to their economic well-being.

The pleadings support and the jury could find that Ford's conduct constitutes a wrongful demand and coercive behavior. "[I]f Ford, through a series of acts, deprived (plaintiff dealer) of the right as an independent businessman to control its own business to serve (Ford Motor's) own economic interest and in disregard of (the dealer's) interest, a violation of the Act could result." ***Colonial Ford, Inc. v. Ford Motor Co.***, 577 F.2d 106, 110 (10th Cir. 1978), ***cert. denied***, 444 U. S. 837 (1979). This is exactly what Ford has done with the CPA program. Ford forced the CPA program on dealers, which controlled the dealers' business, to the benefit of Ford and to the detriment of the dealers.

D. The inquiry into "coercion and intimidation" is inherently fact-specific. Based on cases in far different procedural postures, Ford urges that Plaintiffs can not go forward on their Dealer Day in Court claims based on lack of evidence *in these other cases*. However, the issue of coercion or intimidation under the Act is inherently fact-specific and is thus a jury question not susceptible to a ruling on motion to dismiss. ***H.C. Blackwell***, 620 F.2d at 107. *See also Colonial Dodge*, 11 F.Supp.2d at 743 (coercion and intimidation can be inferred from a course of conduct). The court in ***Capital Ford II*** granted summary judgment on the Dealer Day in Court Act claims based on *lack of evidence* of coercion. ***Capital Ford***

II, 819 F.Supp. at 1555-56. Likewise in *Overseas Motors, supra*, the granting of directed verdict was based on *lack of evidence*. See also, *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210-11 (11th Cir.), *cert. denied*, 475 U.S. 1122 (1986) (lack of evidence of coercion; judgment reversed); *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033, 1039 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981) (lack of evidence of coercion or intimidation; directed verdict affirmed). Compare *H.C. Blackwell Co.*, 620 F.2d at 107 (jury finding of coercion satisfactory; judgment NOV reversed and jury verdict reinstated).

The Third Circuit has held that a dealer is entitled to discover evidence to support a "bad faith" claim based on a manufacturer's allocation of trucks that was slowly driving the dealer out of business. The Third Circuit held that such tactics may well prove a Dealer Day in Court claim, even though there was no "wrongful demand" pleaded or proved. *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 575-76 (3rd Cir. 1986).⁹ Here, Ford is alleged to have coerced Plaintiffs through price controls just as effectively as was the plaintiff in *Arnold Pontiac* through allocation controls.

⁹ See also *Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation in the USA*, 533 F.2d 510, 516-17 (10th Cir. 1976) (manufacturer's control of retail pricing through price controls may serve to trigger Dealer Day in Court liability).

Cases where plaintiffs failed to develop evidence necessary to overcome motions for summary judgment or directed verdict do not support the granting of Ford's Motion to Dismiss here. Plaintiffs are entitled to discover and present evidence that supports their claim.

E. The Statute and Legislative History Contradict Ford's Argument. Finally, Ford wrongly argues that failure to comply with franchise terms will not support a Dealer Day in Court action. The legislative history of the Act, and the actual language of the Act, both belie this argument. "An automobile dealer may bring suit against any automobile manufacturer . . . by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise." 15 U.S.C. §1222. "This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith **in performing or complying with any of the provisions of his franchise** or in terminating, canceling, or not renewing his franchise." H.R.Rep.No.2580, 85th Cong., 2d Sess. (1956), 3 U.S.Code Cong. and Admin.News, 1956, p. 4600 (**emphasis added**). Cases cited by Ford for the contrary proposition do not stand for the proposition Ford alleges¹⁰. "The federal [Dealer Day in

¹⁰ *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708 (10th Cir. 1970), does not hold, as Ford implies, that a breach of

(Continued on following page)

Court] act was designed to create a level playing field for negotiations between local businessmen and multinational automotive companies." *Sherwood Ford v. Ford Motor Company*, 875 F.Supp. 590, 593 (E.D. Mo. 1995). Ford's cases do not support its Motion to Dismiss.

V. THE ROBINSON-PATMAN ACT CLAIM IS PROPERLY PLEADED.

A. Plaintiffs Have Satisfied the Pleading Requirements. According to the Supreme Court, a plaintiff must plead and prove the following elements in a Robinson-Patman Act case: (1) two or more sales, at least one of which was made in interstate commerce [13, 18,

contract will not support a statutory claim under the Dealer Day in Court Act; rather, the case states in dicta that the statutory action is in addition to any common-law breach of contract claim the dealer may have. *Globe Motors, Inc. v. Studebaker-Packard Motors Corp.*, 328 F.2d 645 (3rd Cir. 1964), holds only that the Dealer Day in Court statute "does not provide a new remedy for breach of contract," not that a breach of franchise terms may not be the basis for a suit under the statute. *Quarles v. General Motors Corp.*, 597 F.Supp. 1037 (D.C.N.Y. 1984), *aff'd* 758 F.2d 839 (2nd Cir. 1985), related to dealership termination, not breach of contract; the court said in dicta that the Act did not create a new federal remedy for breach of contract. It did not hold that breach of franchise terms would not be germane to claims under the Act. *General Motors Corp. v. MAC Co.*, 247 F.Supp. 723 (D. Colo. 1965), does not hold or even imply that

* * *

* * *

discounts so as to maximize its profits and to control Plaintiffs' profits. If Ford had published those prices or discounts as its franchise agreement required it to do, all dealers would have been entitled to buy products for those published prices, and Ford's argument of "equal availability" would have some merit. However, Ford did not do so. Therefore, Ford's argument that these secret prices were really "available" to all dealers, and that the dealers, contrary to good commercial practices, simply chose not to take advantage of their availability, is false and inconsistent with the allegations in the Second Complaint which the Court must accept as true at this time.

The CPA discounts offered to dealers under the appeal process were never published, known or available to all dealers on all sales of comparable trucks. Thus, the Fifth Circuit *Metro Ford* case does not apply here.

CONCLUSION

Plaintiffs have pleaded three causes of action consistent with the requirements of Fed.R.Civ.P. 8 and the substantive claims made. Plaintiffs clearly have stated claims for which relief can be granted. Ford's Motion to Dismiss is predicated on cases where lack of evidence was the controlling factor or on cases that were decided on grounds not applicable here. Ford's Motion must be denied.

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RESPECTFULLY SUBMITTED:

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ATTORNEYS FOR
PLAINTIFFS

Resp. App. 74

[Seal]

MEMORANDUM

TO: Counsel of Record
FROM: Robert L. Vining, Jr.
RE: Bayshore Ford Truck Sales v. Ford Motor
Company, Civil Action No.: 4:99-CV-173
DATE: February 2, 2000

It has come to the court's attention that the order docketed January 19, 2000 in the above-referenced case contains a typographical error. The second to last sentence in the first full paragraph on page eight omitted the word "not"; that paragraph should read as follows:

As such, Ford's demand, explicit or implicit, that the plaintiffs participate in the CPA program or pay inflated published wholesale prices is not a wrongful demand and does not constitute coercion or bad faith within the meaning of the Dealers' Day in Court Act.

Enclosed is a corrected copy of the order for your files.

Resp. App. 75

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Bayshore Ford Truck Sales, |
Inc., et al., |

Plaintiffs, |

v. |

Ford Motor Company, |
Defendant. |

CIVIL ACTION
No. 4:99-CV-173-RLV

ORDER

(Filed Jan. 19, 2000)

This action arises out of various franchise agreements between Ford Motor Company and five Ford medium- and heavy-duty truck dealers. The plaintiffs allege that the defendant, Ford Motor Company ("Ford"), breached its contracts with the plaintiffs and violated several federal statutes in administering its pricing programs. Before the court is the defendant's motion to dismiss for failure to state a claim upon which relief could be granted pursuant to Fed. R. Civ. Pro. 12(b)(6) [Doc. No. 16].

I. FACTUAL BACKGROUND¹

Until 1998, each of the five plaintiffs was a Ford heavy- and medium-duty truck dealer that serviced customers throughout the United States.² The plaintiffs, therefore, competed with each other and with dealers of other brands of medium- and heavy-duty trucks on a nationwide basis. Each plaintiff operated under a franchise agreement with Ford, the material terms of which are substantively identical to each other. Under the franchise agreements, the plaintiffs would purchase heavy- and medium-duty trucks and other company products, such as replacement parts, from Ford for resale to the public.³ According to Paragraph 10 of the franchise agreement, Ford was required to publish all prices and discounts to the plaintiffs, as follows:

Sales of COMPANY PRODUCTS by the Company to the Dealer hereunder will be made in accordance with the prices, charges,

¹ The court draws the facts from the plaintiffs' complaint, the allegations of which the court must accept as true for purposes of ruling on Ford's motion to dismiss. *See, Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998).

² Ford ceased manufacturing and distributing heavy- and medium-duty trucks in 1998.

³ Ford's medium- and heavy-duty trucks were sold to dealers as bare chassis. The chassis was a component of the complete vehicle, which was usually assembled by the dealer, a special company called a "body company," or by the final, retail customer. The chassis was typically ordered by the dealer for resale to a particular retail customer and was configured to the retail customer's specifications.

discounts and other terms of sale set forth in price schedules and other notices published by the Company to the Dealer from time to time in accordance with applicable HEAVY TRUCK TERMS OF SALE BULLETIN or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN. Except as otherwise specified in writing by the Company, such prices, charges, discounts and terms of sale shall be those in effect, and delivery to the Dealer shall be deemed to have been made and the order deemed to have been filed on the date of delivery to the carrier or the Dealer, whichever occurs first. The Company has the right at any time and from time to time to change or eliminate prices, charges, discounts, allowances, rebates, refunds or other terms of sale affecting COMPANY PRODUCTS by issuing a new HEAVY DUTY TRUCK or PARTS AND ACCESSORIES TERMS OF SALE BULLETIN, new price schedules or other notices.

Although the plaintiffs admit that Ford published wholesale prices to them, the plaintiffs contend that, in approximately 1980, Ford began intentionally pricing its medium- and heavy-duty trucks at wholesale prices far in excess of the retail prices these trucks could command in the marketplace. At about the same time, Ford also implemented a pricing program called the "Competitive Price Assistance," or "CPA," program whereby the plaintiffs could apply for and receive discounts or concessions off these inflated wholesale prices, reducing the final wholesale price to

a level below the retail price at which the trucks were resold. As a consequence, the plaintiffs were not able to resell Ford medium- and heavy-trucks for a profit without the CPA program.

According to the plaintiffs, the true purpose of the CPA program was to allow Ford to control dealer profits on the sale of medium- and heavy-duty trucks. Ford accomplished this goal by offering two levels of discounts through the CPA program. The first level, called the "Rainbow Schedule" discounts, was published to the plaintiffs and was generally available to all dealers at all times on virtually all sales.⁴ The second level, called the "Appeal-level CPA" discounts, was not published to the plaintiffs or made generally available to all dealers.

The plaintiffs contend that the Appeal-level CPA discounts were given by Ford at its sole discretion based on unpublished criteria.⁵ As a result, the plaintiffs had

⁴ This level was later discontinued and replaced with another program called the "Sales Advantage CPA." This program also was published to the plaintiffs and made generally available to all dealers.

⁵ Specifically, when applying for an Appeal-level CPA discount, the dealer was required to identify the retail customer and provide the proposed retail price. Ford then responded in one of three ways: (1) no Appeal-level CPA discount was given; (2) an amount of Appeal-level CPA discount was given, but that amount was insufficient to bring the published wholesale price below the retail price; or (3) just enough Appeal-level CPA discount was given to reduce the published wholesale price to a level that allowed the dealer to realize a profit of between 0%

(Continued on following page)

no way of knowing whether they were receiving the greatest possible Appeal-level CPA discount. Ford's Appeal-level CPA discounts on comparable trucks could vary among dealers by as much as \$15,000 per truck.

In addition to the Appeal-level CPA discounts, Ford also operated a price program on replacement parts to dealers. Under this program, certain dealers could obtain unpublished discounts off the published wholesale price on certain purchases of replacement parts. These unpublished discounts were not available to the plaintiffs or to all dealers generally. According to the plaintiffs, Ford intentionally withheld information and deceived and misled the plaintiffs about the Appeal-level CPA and replacement parts discounts Ford was offering to some dealers.

The plaintiffs filed this law suit alleging that Ford breached the price publication requirements of the franchise agreements and violated the Dealers' Day in Court Act and the Robinson-Patman Act. Ford filed a pre-answer motion to dismiss all three of the plaintiffs' claims for failure to state claims upon which relief can be granted.

and 4% of the total retail price. If either of the first two responses was given, the dealer typically lost the sale.

II. LEGAL DISCUSSION

A. Legal Standard

When considering a Rule 12(b)(6) motion to dismiss, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiffs. See *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir.1998). A Rule 12(b)(6) motion to dismiss should be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their allegations which would entitle them to relief. *Id.*

B. Breach of Contract

With regard to their breach of contract claim, the plaintiffs contend that Ford breached its obligation under paragraph 10 of the franchise agreements to publish the prices and discounts for its medium- and heavy-duty trucks and replacement parts and to sell its products at those published prices. According to the plaintiffs, paragraph 10 required Ford to publish the same prices and discounts to each of the plaintiffs and to all other dealers operating under a similar franchise agreement and that the purpose of this provision was to ensure equitable pricing among competing dealers. Specifically, the plaintiff's second amended complaint alleges the following: (1) the existence of valid contracts between the plaintiffs and the defendant; (2) that the defendant breached these contracts by failing to publish prices, discounts, and other terms of sale to the plaintiffs and by failing to

sell its products in accordance with the published prices, discounts, and other terms of sale; (3) that the plaintiffs were damaged as a result of the alleged breach.

Ford argues that paragraph 10 of the franchise agreements did not require Ford to publish its prices in the manner the plaintiffs maintain, and, therefore, Ford's failure to do so cannot constitute a breach. While Ford's interpretation of the contract ultimately may prove to be correct, the language of the contract is not so clear and unambiguous that the court is prepared to find as a matter of law that the defendant did not breach the agreement. *Meagher v. Wayne State University*, 565 N.W.2d 401, 415 (Mich. Ct. App. 1997) (noting that, under Michigan law, where the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties, making summary disposition inappropriate).⁶ At this juncture, the court cannot say that it is beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief on their breach of contract claim. Contrary to Ford's assertions, the plaintiffs' allegations are sufficient to state a claim for breach of contract. Accordingly, the defendant's motion to dismiss the plaintiffs' breach of contract claim is **DENIED**.

⁶ The court cites Michigan law in this instance because the franchise agreements at issue in this case selected the law of Michigan to govern any contract disputes between the parties.

C. Dealers' Day in Court Act

Ford also moves to dismiss the plaintiffs' Dealers' Day in Court claim for failure to allege a lack of good faith involving coercion, intimidation, or a threat thereof. The Federal Automobile Dealers Franchise Act, commonly referred to as the "Automobile Dealers' Day in Court Act," 15 U.S.C. §§ 1221-1225, gives an automobile dealer a cause of action against an automobile manufacturer for failing to act in good faith in performing or complying with the terms of the franchise agreement between the dealer and the manufacturer. The term "good faith" used in the Dealers' Day in Court Act has a narrow and specialized meaning. An allegation of bad faith in the ordinary sense does not support a Dealers' Day in Court Act claim. Rather, the dealer must allege "coercion, intimidation or threats of coercion or intimidation." 15 U.S.C. § 1221(e); *see also Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985) ("In the absence of coercion, intimidation or threats thereof, there can be no recovery under the Act, even if the manufacturer otherwise acts in "bad faith" as that term is normally used."). Coercive conduct may be shown by "a wrongful demand which will result in sanctions if not complied with." *H.C. Blackwell Co., Inc. v. Kenworth Truck Co.*, 620 F.2d 104, 107 (5th Cir. 1980).

In this instance, the plaintiffs alleged that Ford created the CPA program to circumvent its contractual obligations to publish its prices, discounts, etc., to each of the plaintiffs and to sell its products at

those published prices. The plaintiffs further alleged that Ford "used its size and power to coerce and intimidate" the plaintiffs into using the CPA program to their detriment and described the defendant's treatment of the plaintiffs in pricing medium- and heavy-duty trucks as "discriminatory, coercive and unfair." However, beyond these conclusory allegations of coercion, the plaintiffs do not allege specific conduct on the part of the defendant that was coercive or threatening; nor do the plaintiffs provide an example of a wrongful demand made by the defendant or of sanctions that will result if the demand is not complied with.

In their brief, the plaintiffs argue that, in drawing all inferences in a light most favorable to the plaintiffs, their complaint alleges economic coercion by the defendant. Specifically, the plaintiffs argue that the defendant wrongfully demanded that they participate in the CPA program or be forced to pay wholesale prices so exorbitant that they would be driven out of business and that this was an implicit rather than overt threat. However, as Judge Evans correctly concluded in *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555 (N.D. Ga. 1992), a manufacturer is free to set its wholesale price or its price discounts at whatever level the manufacturer chooses without running afoul of the Dealers' Day in Court Act. *Id.* at 1566-67. As such, Ford's demand, explicit or implicit, that the plaintiffs participate in the CPA program or pay inflated published wholesale

prices is not a wrongful demand and does not constitute coercion or bad faith within the meaning of the Dealers' Day in Court Act. Consequently, the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim is **GRANTED**.

D. Robinson-Patman Act

Ford also moves to dismiss the plaintiffs' claim asserting a violation of Section 2(a) of the Robinson-Patman Act. The Robinson-Patman Act prohibits a seller from engaging in unlawful price discrimination among its customers. 15 U.S.C. § 13a. To establish a Robinson-Patman Act claim, the plaintiffs must plead and prove: (1) that the sales at issue were made in interstate commerce, (2) that the goods sold were of like grade and quality, (3) that the defendant discriminated in price between the purchasers of the goods, and (4) that the discrimination had a prohibited effect on competition. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990); see also *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988).

Ford contends that the plaintiffs' complaint is insufficient for several reasons. First, Ford argues that the plaintiffs failed to allege that the trucks at issue were of "like grade and quality" and failed to allege an impact on competition. After a review of the plaintiffs' complaint, the court finds that the plaintiffs have adequately pled the elements of like grade and quality and impact on competition under the

notice pleading requirements of Rule 8, Federal Rules of Civil Procedure.

The purpose of notice pleading is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Quality Foods v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The specificity with which Ford contends the plaintiffs must plead their Robinson-Patman Act claim is not warranted under this liberal pleading standard. Whether the trucks in issue are in fact of like grade and quality or whether the favored and disfavored purchasers were in fact competing on the same functional level in the same geographic markets will require further investigation through discovery and is more properly addressed at summary judgment.

The same is also true with regard to Ford's contention that the plaintiffs failed to allege contemporaneous sales. Ford provides no authority for the proposition that the plaintiffs must affirmatively allege that the sales that form the basis of the claim were contemporaneous in order to comply with Rule 8. It is true that "the sales under comparison must be reasonably contemporaneous" as stated in *Black Gold, Ltd. v. Rockwool Indus.*, 729 F.2d 676, 683 (10th Cir. 1984). However, nothing in *Black Gold* or the other cases cited by Ford requires a plaintiff to affirmatively

plead contemporaneousness in the complaint to avoid dismissal for failure to state a claim.⁷

Ford also contends that the plaintiffs failed to allege that the CPA discounts were not functionally available to them. However, functional availability is not an essential element of the plaintiffs' claim, but a defense available to the defendant to negate the essential element of price discrimination. See *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1516-17 (11th Cir. 1989) (discussing the "the judicially created "availability defense"); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326-27 n.17 (5th Cir. 1998) (noting that the functional availability theory is technically not an affirmative defense, but the negation of an element of the plaintiff's case); see generally 3 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 25.7 at 455 & n.79 (1983) (stating that availability may operate as either a rebuttal of the plaintiff's prima facie case or as a

⁷ The procedural posture of each of the three cases cited by Ford makes those cases inapplicable here. All three involved a review of the facts in the record, not a review of the allegations in the complaint.

The court could find only one case involving a defendant's motion to dismiss a Robison-Patman Act claim for failure to affirmatively plead contemporaneous sales. In that case, the district court denied the motion, stating, "The necessary relationship of two sales to bring them within the scope of Section 2(a) is a matter of many facts, and a cause of action should not be dismissed for failure to plead complete details such as specific dates of sales." *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230, 235 (D.N.J. 1956).

defense and noting that "the issue is more likely to expressly raised by the defendant than by the plaintiff"). As such, it is not necessary for the plaintiffs to plead functional availability in their complaint, and a failure to do so will not result in dismissal.

Finally, Ford claims that the plaintiffs' complaint is insufficient because it contains no allegation of two completed sales to different purchasers. According to Ford, the plaintiffs claim rests on a competitive bidding process and that, under *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), this sort of claim is not cognizable under the Robinson-Patman Act.

To state a claim under the Robinson-Patman Act, the plaintiffs must allege at least two sales "at two different prices to two different actual buyers." *M.C. Manufacturing Co.*, 517 F.2d at 1065; *Pierce v. Commercial Warehouse, Div. of Thompson Automotive Warehouse*, 876 F.2d 86, 87 (11th Cir.1989). In a competitive bidding situation, in which only one of the bidders will ultimately secure the sale, the two-purchaser requirement cannot be met. The Robinson-Patman Act requires competitive buyers not competitive bidders. *M.C. Manufacturing Co.*, 517 F.2d at 1066-67.

Ford admits in its brief that the plaintiffs' complaint alleges both completed sales of comparable trucks at higher prices and lost bids. Def.'s Br. At 17. After reviewing the complaint, the court agrees with this assessment. See Pls.' Compl. at ¶¶ 79 & 82.

However, Ford asserts that the plaintiffs "did not actually buy any vehicles from Ford in competition with any other dealer at a higher price as a result of the disputed discounts, because the agreement to purchase the vehicle by the ultimate consumer was entered into before any actual vehicle sales occurred to fulfill the contracts." In support of this contention, Ford cites paragraph 37 of the complaint, which states:

When applying for Appeal-Level CPA, the named Plaintiffs and other dealers were required to tell Ford the identity of the dealer's retail customer and the proposed retail price the dealer anticipated charging for the truck(s). Ford then gave, in its sole discretion, either:

- a. no Appeal-Level CPA;
- b. an insufficient amount of Appeal-level CPA to bring the True Dealer Cost below retail price (effectively precluding the dealer from completing the transaction); or
- c. just enough Appeal-Level CPA to reduce the True Dealer Cost to a level that would allow the dealer to realize a profit of from 0% to 4% of the total retail price.

However, this paragraph of the complaint does not say as much as Ford contends it says. Neither this paragraph nor the other allegations of the complaint

make it clear that all the sales at issue arose in a competitive bidding context.

The court notes that the problem with Ford's argument on this issue may be one of timing.⁸ Whether the plaintiffs' allegations are in fact supported by any evidence or are in fact true are not issues before the court on a motion to dismiss for failure to state a claim. If Ford's contention is true that all of the plaintiffs' transactions arise in a competitive bidding context, these facts will come to light during discovery. At that time, Ford may move for summary judgment on the basis that the plaintiffs have failed to present any evidence of two competing purchasers. See, e.g., *Capital Ford Truck Sales, Inc. v. Ford Motor Company*, 819 F. Supp. 1555, 1574 (N.D. Ga. 1992) (finding that the record established that the two-purchaser requirement was not met, thus entitling the defendant to summary judgment). However, at this stage in the proceedings, the plaintiffs' complaint alleges that they bought trucks of like grade and quality at higher prices than other competing dealers, and, for purposes of this motion to dismiss, the court must accept that allegation as true.

⁸ The same is true of the plaintiffs' argument that they fall within the narrow exception to the two-purchaser requirement established in *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951).

III. CONCLUSION

For the reasons discussed above, the court **GRANTS IN PART** and **DENIES IN PART** the defendant's motion to dismiss. Specifically, the court **GRANTS** the defendant's motion to dismiss the plaintiffs' Dealers' Day in Court Act claim, but **DENIES** the defendant's motion to dismiss the plaintiffs' breach of contract and Robinson-Patman Act claims.

SO ORDERED, this 19th day of January, 2000.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

**BAYSHORE FORD TRUCK
SALES, INC., HEINTZEL-
MAN'S TRUCK CENTER,
INC., LJI TRUCK CENTER,
INC., PEACH STATE FORD
TRUCK SALES, INC., And
VALLEY FORD TRUCK
SALES, INC., Individually
and as Representatives
for a Class of Similarly
Situated Entities,**

Plaintiffs,

vs.

FORD MOTOR COMPANY,

Defendant.

CIVIL ACTION NO.

4:99-CV-173-RLV

CONSENT ORDER STIPULATING THAT
THE THIRD AMENDED COMPLAINT
DOES NOT REVIVE PLAINTIFFS'
DEALER DAY IN COURT ACT CLAIMS

(Filed Jan. 22, 2003)

The Court having dismissed Plaintiffs' 15 U.S.C. § 1221 Dealer Day in Court Act claims by Order dated January 10, 2000, and Plaintiffs having filed their Third Amended Complaint which includes the claim as initially pled, the parties hereby agree and stipulate that Plaintiffs' Dealer Day in Court Act

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claims are dismissed and remain dismissed by operation of the Court's January 10, 2000 Order and are not revived and were not intended by any party to be revived by subsequent filing of the Third amended Complaint.

Consented this 17th day of January 2003 by:

BAKER & HOSTETLER LLP

By: /s/ Billy M. Donley

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HAVING considered the foregoing Consent Order, it is SO ORDERED this 22nd day of January 2003.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

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Docket No. 08-12587-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BAYSHORE FORD TRUCK SALES, INC., et al.,
Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia, Rome Division,
Civil Action No. 4:99-CV-0173-RLV

APPELLEES' BRIEF

(Filed July 18, 2008)

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argument is hinged did not play any known role in the District Court's decision to dismiss the case, and Ford's efforts to read the District Court's mind on the issue should be ignored.

V. STANDARD OF REVIEW

The standard of review for this appeal is *de novo*. See *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1242 (11th Cir. 2007).

VI. SUMMARY OF ARGUMENT

The District Court dismissed the case in accordance with this Court's recent decision in *Pintando*, as it was required to do. Despite Ford's arguments from the dicta in the District Court's order, the *timing* of the dismissal of the two federal claims in the case is not relevant to the decision to dismiss the case; rather, the fact that they were dismissed and the *manner* in which they were dismissed are the keys.

Boiled to its essence, Ford's argument is that once a district court grants a motion to dismiss a federal claim under F.R.C.P. 12(b)(6), it retains jurisdiction over state law claims forever no matter what else happens in the case. This is not, and has never been, the law. Ironically, the entire idea behind supplemental jurisdiction is judicial efficiency, but Ford's campaign to have the District Court retain jurisdiction in *this* case (for which it cites "supplemental jurisdiction" as the key) will actually create exactly the *opposite* situation: the same case will of necessity be tried in two separate fora – the Georgia federal court and the Ohio state court – destroying even the conceptual *possibility* of judicial economy.⁷

Federal courts are courts of limited jurisdiction, established only to adjudicate federal-question claims, diversity claims, and claims involving the federal government. The central purpose of 28 U.S.C. §1367 is to enable courts to prevent duplicative waste of the time and resources of the judicial system. When those policy ills are not present, and they are not present here, the remedy for them is not necessary.

Ford's argument that the involuntary dismissal of the DDCA claim very early on in the case under F.R.C.P. 12(b)(6) somehow "cemented" in place the District Court's jurisdiction is severely misguided. See

⁷ See *Mullen v. Thompson*, 155 F.Supp.2d 448, 454 (W.D. Pa. 2001).

Ford's Brief, p. 10. At the time the DDCA claim was dismissed – on January 19, 2000, less than seven months after the case was filed and before Ford had even filed an answer – there remained in the case a lone federal claim under the Robinson-Patman Act (RPA),⁸ and it was the RPA claim that at the time supported the trial court's continuing federal jurisdiction. Had the DDCA claim been the sole federal claim in the case originally, it is virtually certain the District Court would have dismissed the case in January 2000 when it dismissed that (sole) federal claim.⁹

* * *

b. The DDCA Claim Never Really Exited The Case At All Because It Was "Retained" In The Third Amended Complaint, Supposedly So That Plaintiffs Could Appeal Its Dismissal At Some Future Point. Ford's brief, pp. 20-21.

In this argument, Ford asserts that the federal DDCA claim was "continued" in the Third Amended Complaint because the Plaintiffs supposedly intended to complain about the dismissal of that claim on appeal. Appellant's Brief at 20-21. However, even a

⁸ The Robinson-Patman Act is found at 15 U.S.C. § 13(a), et seq.

⁹ See *Carnegie-Mellon Univ. v. Cohill*, 481 U.S. 343, 349-50 (1988), explaining

* * *

cursory review of the historical record in this case totally belies that assertion.

The DDCA claim was dismissed on January 19, 2000 under F.R.C.P. 12(b)(6), about seven months after the case was first filed on July 1, 1999 and *before Ford even filed its answer* on February 7, 2000. During the next several years, the case was appealed to this Court twice, once on June 11, 2003, and then again on August 12, 2005, and two other appellate actions were commenced, one in May 2001 (petitioning this Court to review the District Court's denial of class certification), and one in December 2003 (on the issue of costs). In none of those appellate actions did the Plaintiffs brief the issue or even argue that the dismissal of the DDCA claim was improper. In effect, Plaintiffs dismissed that claim the same as if they had filed an amended complaint or a formal motion to dismiss it. That is why its inclusion in the Third Amended Complaint was deemed to be (and *agreed* to be) a non-event, and why it was not included in the pre-trial order.

* * *

both cases went forward and ended with disparate rulings, it would call into question the efficacy and fairness of the judicial system as a whole *and* cast doubt on the propriety of *both* judgments. Such a result would be detrimental to the judicial system and to all of the parties in these cases. The only way to avoid that risk is to dismiss this case so that all the parties and all the issues can be tried a single time in

the *Westgate* case. That is what the District Court has properly accomplished by dismissing the case, and that decision should not be disturbed.

CONCLUSION

The District Court properly dismissed the case in accordance with the *Pintando* precedent, and its ruling should be affirmed. In the alternative, the District Court was well within its discretion to dismiss the case, and this Court should affirm the dismissal on this alternative ground.

Respectfully Submitted,

**Pope, McGlamry, Kilpatrick
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